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Supreme Court, U.S.
FILED

021237 FEB 20 2003

No. OFFICE OF THE CLERK

In the
Supreme Court of the United States

William H. PRYOR Jr., Attorney General for the State of Alabama; J.C. Upshaw Downs, Director and Chief Medical Examiner, Alabama Department of Forensic Sciences; Joe Hubbard, District Attorney for Calhoun County, Alabama; Calhoun County District Attorney's Office,

Petitioners,

v.

Danny Joe BRADLEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 20, 2003

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QUESTIONS PRESENTED

1. Is a post-conviction § 1983 action — whose sole conceivable purpose is to obtain evidence that the convict hopes will exonerate him — the functional equivalent of a habeas petition under *Heck v. Humphrey* and therefore subject to the bar against successive habeas petitions in 28 U.S.C. § 2244(b)?

2. Does a prisoner have a procedural or a substantive due process right to obtain evidence from the State after his conviction?

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DECISIONS BELOW

The order of the United States District Court for the Northern District of Alabama dismissing respondent's § 1983 complaint is not reported (App. 13.)

The opinion of the United States Court of Appeals for the Eleventh Circuit reversing the judgment of the district court is reported. *Bradley v. Pryor*, 305 F.3d 1287 (11th Cir. 2002) (App. 1). The order of the Eleventh Circuit denying rehearing is not reported (App. 12).

STATEMENT OF JURISDICTION

On August 3, 2001, United States Magistrate Judge Paul W. Greene issued a report and recommendation that respondent Danny Joe Bradley's § 1983 complaint should be dismissed (App. 15). On September 24, 2001, the United States District Court for the Northern District of Alabama adopted the magistrate's report and recommendation (App. 13). On September 23, 2002, the United States Court of Appeals for the Eleventh Circuit reversed the judgment of the district court and remanded the case for further proceedings (App. 1). The Eleventh Circuit denied rehearing on November 22, 2002 (App. 12). This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. XIV, § 1, cl. 2. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2244(b). When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

42 U.S.C. § 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress

applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Nature of the Case

The respondent in this case, Danny Joe Bradley, is a death row inmate in Alabama who was convicted in 1983 of murdering his twelve-year-old stepdaughter Rhonda Hardin after raping and sodomizing her. He was sentenced to death. His conviction and sentence were affirmed on direct appeal. *Bradley v. State*, 494 So. 2d 750 (Ala. Crim. App. 1985), aff'd, 494 So. 2d 772 (Ala. 1986). His state post-conviction petitions for relief and federal habeas petition were both denied. *Bradley v. State*, 557 So. 2d 1339 (Ala. Crim. App. 1989) and *Bradley v. Nagle*, 212 F.3d 559 (11th Cir. 2000).

In June 2001, Bradley filed this action under 42 U.S.C. § 1983 against petitioners Bill Pryor, Attorney General for the State of Alabama; J.C. Upshaw Downs, Director and Chief Medical Examiner for the Alabama Department of Forensic Sciences; Joe Hubbard, District Attorney for Calhoun County, Alabama; and the District Attorney's Office for Calhoun County, where Bradley had been convicted. Bradley sought to obtain for DNA testing a number of items of evidence that had been used at trial to connect him to the crime but had not been introduced into evidence — the rape test kit containing Rhonda Hardin's oral, vaginal, and rectal swabs, substance smears, and the contents of her stomach (gastric juices); the corduroy pants that Rhonda was wearing when her body was found; hair evidence, including Rhonda's pubic hair combing, a hair found in Rhonda's hand, and several pubic hairs found on the bedding on which Bradley was

believed to have raped and sodomized Rhonda, consisting of a blanket and a sheet; and her fingernail scrapings. The State could not locate the rape test kit or the pants, but it did file an emergency ex parte motion in the Calhoun County Circuit Court seeking the release of the hair evidence and the fingernail scrapings, as well as the bedding. The State's and Bradley's experts both performed DNA testing on the items. The pubic hairs and fingernail scrapings did not have any testable debris, but the bedding contained semen and fecal matter stains that were DNA-matched to Danny Joe Bradley and to Rhonda.

On September 24, 2001, the district court dismissed Bradley's § 1983 action on the ground that it was the functional equivalent of a habeas petition and therefore barred as successive under 28 U.S.C. § 2244(b). (App. 13). The Eleventh Circuit reversed, ruling that the relief sought by Bradley — receipt of evidence from the State — did not necessarily undermine the validity of his state court conviction and thus did not render his § 1983 action the functional equivalent of a habeas petition. This ruling was in direct conflict with recent rulings by the Fourth and Fifth Circuits. The Eleventh Circuit did not address the alternative ground for affirmance pressed by the state officials: that Bradley had failed to state a claim that he had been denied due process. The state officials file this petition for a writ of certiorari, asking this Court to resolve the split on the functional equivalence question and to answer the question whether a prisoner has a procedural or a substantive due process right to obtain evidence after conviction.

B. Facts

Bradley was convicted in 1983 of two counts of capital murder for killing his twelve-year-old stepdaughter Rhonda Hardin – one count of murder during rape in the

first degree and one count of murder during sodomy in the first degree. After a sentencing hearing, the jury unanimously recommended that Bradley be sentenced to death. The trial court conducted its own sentencing hearing and, agreeing with the jury's recommendation, sentenced Bradley to death.

The evidence presented at trial, which is set forth in great detail in the Eleventh Circuit Court of Appeals' opinion affirming the denial of Bradley's habeas corpus petition, is summarized as follows: On January 24, 1983, the night of Rhonda Hardin's murder, Rhonda and her younger brother, Gary "Bubba" Hardin, were left in the care of their stepfather, Danny Joe Bradley. The children's mother, Judy Bradley, had been hospitalized for over a week. Rhonda was last seen on the sofa in the Bradley home, watching television, at approximately 8:00 p.m. Although Rhonda told her brother to wake her if she fell asleep on the sofa, when Bubba decided to go to bed, Bradley told him not to wake Rhonda. Bradley also told Bubba to sleep in Bradley's and his mother's bedroom instead of the room Bubba normally slept in with Rhonda. Bubba testified that around midnight, he was awakened by a bumping noise in the kitchen and the sound of the back door being unlatched. Bubba also testified that Bradley had frequently rendered him and Rhonda unconscious by squeezing their necks.

Around 11:30 p.m. that night, Bradley arrived at his brother-in-law's home acting upset and funny. Bradley told his brother-in-law that Rhonda was missing. Bradley also told a neighbor that he and Rhonda had argued over some medicine Rhonda wanted to take, and that when he awoke, Rhonda was gone. Bradley eventually reported Rhonda's disappearance to police, telling them that Rhonda must have left the house sometime between 11:00

and 11:30 p.m, while he was sleeping. Bradley also told the police that the only time he left the house that evening was around 11:30 p.m., when he realized Rhonda was gone and decided to go looking for her.

At approximately 7:30 a.m. on January 25, 1983, Rhonda's body was found in a wooded area less than six-tenths of a mile from the Bradley home. She had numerous bruises and abrasions on her neck, and it was determined that she died from asphyxia due to strangulation. Pursuant to a consent-to-search form signed by Bradley, the police seized numerous items from the Bradley home, including a pillowcase; a damp, blue towel found in the bathroom closet; a red, white and blue sheet from the children's bedroom; and a white blanket from the washing machine. Police also recovered fiber samples from the trunk of Bradley's car. Bradley provided the police with fingernail scrapings and blood, hair, and saliva samples.

Contrary to Bradley's statement that he had not left his house until he went looking for Rhonda, a local police officer who had known Bradley for more than twenty years had seen Bradley in his car at around 9:30 p.m. on the evening of Rhonda's disappearance in the area where Rhonda's body was found. Upon being informed of this fact, Bradley changed his story, telling police that he had left the house to steal a car, remove its motor, and sell it. Bradley maintained that Rhonda's and Bubba's father, Gary Hardin, asked him to find the motor. Hardin denied Bradley's claim.

Through fiber evidence, the State determined that the fibers found in the fingernail scrapings taken from Bradley matched fibers from the red, white, and blue sheet found in the children's bedroom, fibers from the leg warmers Rhonda was wearing when her body was found,

and the cotton from the pants Rhonda had worn on January 24, 1983. The State also determined that fibers found in the trunk of Bradley's car matched the fibers from Rhonda's clothing.

Further evidence revealed that swabs and substance smears from Rhonda's mouth, vagina, and rectum indicated the presence of semen. Testing of the gastric contents of Rhonda's stomach also indicated the presence of semen. Conventional blood-typing further linked Bradley, a type O non-secretor, to Rhonda's murder. Although Rhonda was also of type O blood, she was a secretor. Two large semen and fecal stains found on the white blanket were consistent with having been left by Bradley and Rhonda, as was a semen and fecal mixture found on the inside of Rhonda's pants. The pillowcase revealed high levels of seminal plasma and spermatozoa consistent with the type O blood group, as well as small blood stains mixed with saliva, which were also consistent with the type O blood group. A mixture of semen and sperm was found on the blue towel located in the bathroom, as well as a vaginal and semen stain. Both were consistent with that which would have been deposited by Bradley and Rhonda. A stain which included spermatozoa found on the red, white, and blue sheet from the children's bedroom was also consistent with having been deposited by Bradley.

C. Proceedings and Disposition Below

Bradley's convictions and death sentence were affirmed by the Alabama Court of Criminal Appeals on November 26, 1985, and by the Alabama Supreme Court on July 25, 1986. *Bradley v. State*, 494 So. 2d 750 (Ala. Crim. App. 1985), aff'd, 494 So. 2d 772 (Ala. 1986). On March 9, 1987, this Court denied Bradley's petition for a

writ of certiorari, with Justices Marshall, Brennan, and White dissenting. *Williams v. Ohio*, 480 U.S. 923 (1987).

In 1987, Bradley filed petitions (an initial pro se petition and two amended petitions after appointment of counsel) for post-conviction relief under Temporary Rule 20 (now Rule 32) of the Alabama Rules of Criminal Procedure. These petitions were denied by the circuit court after an evidentiary hearing. On appeal, the Alabama Court of Criminal Appeals affirmed the denial of Bradley's post-conviction petitions. *Bradley v. State*, 557 So. 2d 1339 (Ala. Crim. App. 1989), and the Alabama Supreme Court denied his petition for a writ of certiorari. This Court denied certiorari review, with Justice Marshall dissenting. *Bradley v. Alabama*, 498 U.S. 881 (1990).

In May 1993, Bradley filed a petition for habeas corpus. The Eleventh Circuit Court of Appeals affirmed the district court's denial of the petition and denied Bradley's application for rehearing en banc. *Bradley v. Nagle*, 212 F.3d 559, *reh'g en banc denied*, 226 F.3d 650 (11th Cir. 2000). At no point during any of his state or federal proceedings did Bradley request production of or access to physical and biological evidence for the purpose of DNA testing. It was not until the June 2001 filing of his 42 U.S.C. § 1983 action that Bradley made his first request in any court for production of evidence for DNA testing.

The magistrate judge recommended dismissing Bradley's § 1983 action on the ground that it was the functional equivalent of a habeas corpus petition and therefore barred as successive under 28 U.S.C. § 2244(b). (App. 15). On September 24, 2001, the district court adopted the magistrate's report and recommendation in its entirety and dismissed the action. (App. 13) The

Eleventh Circuit reversed, finding that Bradley's request for receipt of the evidence for DNA testing did not necessarily undermine the validity of his state court conviction and thus did not render his § 1983 action the functional equivalent of a habeas petition.

Although Bradley's first and only request in either state or federal court for receipt of evidence for DNA testing did not surface until the filing of his § 1983 action on June 26, 2001, 11 days after the Alabama Supreme Court set his execution date for July 20, 2001, correspondence in the case shows that as early as 1996, and perhaps even as early as 1995, Bradley expressed an interest in obtaining evidence for the purpose of DNA testing.

On July 18, 1996, a law student writing on behalf of the Innocence Project at the Cardozo School of Law, and purporting to represent Bradley, wrote to the Director of the Alabama Department of Forensic Sciences inquiring as to the location of various items of evidence that had been collected during the investigation of Bradley's case. These items included the rape test kit and the pants the victim was wearing when her body was discovered — the same items of evidence requested some five years later in the § 1983 action — as well as a blanket and sheet with stains containing fecal matter and semen that were admitted as evidence at Bradley's trial. The Department of Forensics Sciences responded to the Innocence Project's letter on August 6, 1996, stating that it was unable to locate the evidence sought in the Project's July 18 letter. In another letter written by the Innocence Project on September 26, 1997, to the local police department that investigated the case, Bradley again sought preservation of the same evidence for DNA testing. The Project acknowledged in that letter, as it also did in the July 18

letter, that the results of DNA testing may be exculpatory and form the basis of post-conviction litigation, and that the Project could obtain a court order ensuring that the evidence continued to be preserved. The local police department informed the Innocence Project in writing that it did not have in its possession the requested items.

The Innocence Project sent other letters, also written in 1996 and 1997, and still others written in 1998 and 2000, to various state and local agencies in an attempt to locate the evidence for DNA testing. Although the Innocence Project purported to represent Bradley in all of its correspondence, no attorney from that organization ever entered a notice of appearance on Bradley's behalf during his federal habeas proceedings — from 1993 to 1999, during which time Bradley was represented by Theodore Howard, who remains his counsel to date. It was not until he filed his § 1983 action on June 26, 2001, that the Innocence Project appeared on behalf of Bradley in legal proceedings. Furthermore, it was not until September 2000 — when the Alabama Attorney General's Office sent a letter to the Innocence Project declining to consent to the Project's request for DNA testing, in part, because the request had not been made by Bradley's counsel of record — that Theodore Howard became involved in the request for DNA testing.

Thus, despite knowing as early as 1996 that some of the evidence he wanted apparently was lost, and despite knowing that he could seek legal relief, Bradley did not ask the district court in which his post-conviction proceedings were pending to intervene, nor did he file any actions in any state courts for five years. Instead, he waited until 2001, just before his scheduled execution, to file a § 1983 action requesting the evidence he now claims will prove his innocence.

On November 14, 2000, soon after becoming aware of the Innocence Project's earlier efforts to obtain evidence for DNA testing and after attempting unsuccessfully to locate the evidence Bradley had sought, an assistant attorney general wrote a letter to Bradley's counsel offering to conduct nuclear DNA testing on the only items that could be located — the bedding items stained with fecal matter and semen. After no response from Bradley's counsel, on February 2, 2001, the State moved the Alabama Supreme Court to set an execution date. On June 15, 2001, the Supreme Court set Bradley's execution date for July 20, 2001.

On July 6, 2001, some five months after the State had moved for the setting of an execution date, Bradley filed a petition for a stay of execution in the Alabama Supreme Court. He cited as the ground for the stay the § 1983 action he had just filed in the federal district court. Bradley maintained in his stay petition that the DNA testing "will yield results proving [his] innocence of the capital offenses."

Meanwhile, on July 5, 2001, the Attorney General's Office filed an emergency ex parte motion in the state trial court seeking DNA testing of the bedding items with the fecal matter and semen stains. On July 9, 2001, the trial court entered an order proposed by the Innocence Project, which had now become involved in the State's testing efforts. The order allowed the Alabama Department of Forensic Sciences and Dr. Edward Blake, an individual chosen by Bradley's counsel, to test the bedding. The order also allowed for mitochondrial DNA testing of hair evidence, including the pubic hair combings of the victim, pubic hairs found on the bedding, and a hair recovered from one of the victim's hands, and of the fingernail scrapings of the victim. Before the

testing was completed, however, the Alabama Supreme Court granted Bradley's petition for a stay of execution until further notice from the court.

Despite the stay, the DNA testing went forward. Approximately one week after release of the evidence, the Alabama Department of Forensic Sciences concluded its DNA testing, finding that the fecal/semen stain on the white blanket matched the genetic markers of Bradley and the victim. Dr. Blake reached the same conclusions — that the semen portion of the fecal/semen stain on the white blanket was consistent with Bradley's DNA, and that the fecal portion of the stain was consistent with the victim's DNA. Dr. Blake concluded that it was "unlikely that more than one human being has ever possessed this particular genotype array." Dr. Blake further concluded that the fingernail scrapings from the victim, as well as the pubic hair evidence, failed to reveal any significant debris and thus no further work was conducted.

In addition to the DNA testing already completed, which yielded results unfavorable to Bradley, Bradley was given an opportunity to conduct mitochondrial DNA testing on a hair fragment found in the victim's hand. The test showed that Rhonda Hardin could not be excluded as the contributor of the hair.

REASONS FOR GRANTING THE WRIT

In this case, the United States Court of Appeals for the Eleventh Circuit ruled that a post-conviction action brought by a death row inmate under 42 U.S.C. § 1983 to obtain evidence from the State — the only value of which is to permit DNA testing for use in proving the convict's innocence — was not the functional equivalent of a habeas petition under *Heck v. Humphrey* and therefore

should not have been dismissed as a successive habeas petition under 28 U.S.C. § 2244(b). The Eleventh Circuit's ruling conflicts directly with the rulings of the Fourth and Fifth Circuits in *Harvey v. Horan*, 278 F.3d 370, *reh'g denied*, 285 F.3d 298 (4th Cir. 2002), and *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir. 2002), which held that § 1983 actions brought in identical circumstances were functionally equivalent to habeas petitions and therefore subject to the procedural rules governing such petitions. Because this is an issue of great importance, potentially affecting the finality of convictions throughout the 50 States, certiorari is warranted to establish a uniform national rule.

It would also make sense for this Court to grant certiorari on the question that is logically antecedent to the question on which there is a split: whether a state convict has a procedural or a substantive due process right to obtain evidence from the State, after his conviction has become final, which he can assert in a § 1983 action. The State maintains that Bradley has received procedural due process and that he does not have a substantive due process right to the evidence that he seeks. If this position is correct, then the question whether the § 1983 action is the functional equivalent of a habeas petition is moot. The Eleventh Circuit declined to address this alternative ground for affirming the district court's order of dismissal, even though the alternative ground presented a pure question of law that could have been resolved on the pleadings and that the parties had fully briefed. By avoiding the question and remanding to the district court, the Eleventh Circuit essentially added years to the stay of Bradley's execution.

The petitioner state officials ask this Court to grant certiorari now, rather than allowing this case to go back

down to the district court and then perhaps come up again later, for the simple reason that justice delayed is justice denied. Danny Joe Bradley has been on death row for nearly twenty years and has exhausted the legal remedies available to him to attack the validity of his conviction and sentence. DNA testing already performed has corroborated his guilt. He brings this latest federal action in a transparent attempt to delay his execution even further, all the while claiming that this action has nothing to do with the validity of his conviction or sentence and therefore is not subject to the bar on successive habeas petitions. This abuse of process should not be tolerated. It is formalistic to the point of absurdity to suggest that the relief sought by Bradley has any value to him other than to attack, for the umpteenth time, the validity of his conviction and sentence.

The petitioner state officials also ask this Court to grant certiorari now to rule that state prisoners like Bradley have a procedural but not a substantive due process right to obtain evidence after conviction. The scope of a state prisoner's liberty/property interest in the receipt of evidence post-conviction should be determined by state law and procedure. A prisoner will then be able to bring a habeas petition (or a § 1983 action, depending on how this Court resolves the other issue in this case) only when a State denies a prisoner the process ordinarily available in that State to obtain evidence after conviction. This ruling will permit the state legislatures and courts to respond appropriately to the changing capabilities of modern technology in confirming a prisoner's guilt or innocence, while preventing a mushroom cloud of federal litigation on the very same issues.

I. This Court Should Grant Certiorari to Resolve the Split Between the Eleventh and the Fourth and Fifth Circuits on Whether a § 1983 Complaint Is the Functional Equivalent of a Habeas Corpus Petition and Therefore Subject to the Bar Against Successive Petitions.

The Eleventh Circuit held that Bradley's § 1983 action does not "necessarily imply" the invalidity of his conviction or sentence. *Bradley v. Pryor*, 305 F.3d at 1291. In reaching this conclusion, the court ignored the fact that Bradley sought and received a stay of execution from the Alabama Supreme Court based on the representation that he was seeking to prove his innocence through evidence obtained in this § 1983 action. The Eleventh Circuit also created a split with the United States Courts of Appeals for the Fourth and Fifth Circuits.

While the panel purported to follow *Heck v. Humphrey*, 512 U.S. 477 (1994), it ignored the reasoning of this Court in that case and of its predecessor ruling in *Preiser v. Rodriguez*, 411 U.S. 475 (1973). In *Preiser*, this Court held that a reviewing court must look beyond the form or style of a § 1983 complaint to the essence of the claims set forth in it. 411 U.S. at 484-89. The Court acknowledged that the literal language of § 1983 provided the federal courts the ability to grant the relief requested in *Preiser*:

> The broad language of § 1983, however, is not conclusive of the issue before us. The statute is a general one, and, despite the literal applicability of its terms, the question remains whether the specific federal habeas corpus statute, explicitly and historically designed to provide the means for

> a state prisoner to attack the validity of his confinement, must be understood to be the exclusive remedy available in a situation like this where it so clearly applies.

411 U.S. at 489. The Court held that, so long as habeas corpus provided an avenue for the same relief, habeas corpus was the sole source for such relief. *Id.* at 489.

The Eleventh Circuit thus erred in treating Bradley's § 1983 complaint as an independent claim for discovery, apart from any consideration of the relief to which the discovery would have to be directed. The court reasoned that the evidence sought by Bradley might not necessarily give him grounds to challenge his conviction or sentence. This rationale misses the point. Whether or not the items sought in discovery turn out to be helpful, discovery is not an end in-itself but rather is part of an ongoing proceeding in which the claimant seeks some sort of concrete legal or equitable relief. The Eleventh Circuit closed its eyes to the obvious fact that Bradley seeks evidence from the State to attack the validity of his conviction and sentence. The evidence has no other conceivable value to him. The federal habeas corpus statute, including its rules governing discovery, is the proper avenue for Bradley to obtain such relief.

In holding to the contrary, the Eleventh Circuit created a direct conflict with the Fourth and Fifth Circuits. In *Harvey v. Horan*, 278 F.3d 370 (4th Cir. Jan. 23, 2002), the Fourth Circuit found Harvey's claim that his § 1983 action seeking access to biological evidence for DNA testing was not a challenge to the fact or duration of his confinement, but simply a request for evidence that will hopefully allow him to challenge his conviction at a later date, to be an unavailing claim. The Court held that Harvey, although not seeking immediate release, was

nonetheless challenging the validity of his conviction and attempting to use a § 1983 action as a "discovery device" to "set the stage for a future attack on his confinement." *Harvey*, 278 F.3d at 378. Therefore, the Court found, his claim was effectively a petition for a writ of habeas corpus. Id.

The Fourth Circuit noted that "[t]he implications of circumventing *Heck* are no small matter. Harvey would have this court fashion a substantive right to post-conviction DNA testing out of whole cloth or the vague contours of the Due Process Clause." *Harvey*, 278 F.3d at 375. The Court made it clear that in holding that Harvey had failed to state a claim for relief under § 1983, it did decide that criminal defendants should not be permitted to seek evidence and take advantage of advances in technology. "Rather, our decision reflects the core democratic ideal that if this entitlement is to be conferred, it should be accomplished by legislative action rather than by a federal court as a matter of constitutional right. Permitting Harvey's § 1983 claim to proceed would improperly short-circuit legislative activity by allowing judges, rather than legislatures, to determine the contours of the right." *Harvey*, 278 F.3d at 376.

Likewise, in *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir. 2002), the Fifth Circuit, agreeing with the analysis of the Fourth Circuit in *Harvey*, held that the petitioner's suit seeking access to biological evidence for DNA testing was sought "'to set the stage for a future attack on [the prisoner's] confinement' – effectively transforming the claim into a petiton for a writ of habeas corpus." *Kutzner*, 303 F.3d at 341, *quoting Harvey*, 278 F.3d at 378. The Fifth Circuit concluded that Kutzner's request to conduct DNA testing on evidence relevant to his conviction was "'so intertwined' with the merits of the

conviction as to require habeas corpus treatment." *Kutzner*, 303 F.3d at 341, *quoting Martinez v. Texas Court of Criminal Appeals*, 292 F.3d 417, 423 (5th Cir. 2002).

The Fourth and Fifth Circuits are correct. The Eleventh Circuit erred in not affirming the district court's judgment of dismissal on the ground that Bradley's § 1983 complaint is the functional equivalent of a successive habeas corpus petition. This Court should grant certiorari to resolve the split between the Eleventh Circuit and the Fourth and Fifth Circuits and rule that Bradley's § 1983 complaint should be treated as a successive habeas corpus petition.

II. This Court Should Also Grant Certiorari to Address the Question Whether a Prisoner Has a Procedural or a Substantive Due Process Right to Obtain Evidence After Conviction For Use in Proving His Innocence.

Petitioners argued in the district court and in the Eleventh Circuit, as an alternative ground for dismissal, that Bradley had failed to state a valid claim that the petitioner state officials had denied him due process. They argued that Bradley had a procedural but not a substantive due process right to the evidence he sought, and that they had not denied Bradley procedural due process. The Eleventh Circuit could have and should have affirmed the district court's dismissal of Bradley's complaint on this alternative theory. Instead, it remanded for the district court to consider the issues, even though they were pure questions of law, resolvable on the pleadings, and fully briefed by the parties.

This Court should grant certiorari to resolve the due process question because it is an important one that is cropping up in a number of cases throughout the nation and is certain to recur with greater and greater

frequency. *See* Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. Pa. L. Rev. 547, 552 n. 21, 580 n. 133 (2002) (citing numerous cases on both sides of the issue). Its resolution now might moot the consideration of a number of difficult collateral issues that would be posed by recognition of a substantive due process right. Indeed, the due process question is logically antecedent to the first question presented in this case, on which there is a clear circuit split, and should be answered in conjunction with it.

1. The petitioner state officials concede that state prisoners like Bradley have a *procedural* due process right to obtain evidence from the State, after their convictions have become final, to challenge the validity of their convictions. To state a claim that he has been denied procedural due process, Bradley would have to show that Alabama has created a right for inmates to obtain evidence after their convictions have become final and that Alabama has provided constitutionally inadequate procedures to remedy the deprivation of that right. If Alabama has created adequate procedures and Bradley has not availed himself of them, his claim that he has been denied procedural due process must be dismissed. *Zinermon v. Burch*, 494 U.S. 113 (1990); *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994).

Alabama has created a limited right for inmates to obtain evidence after their convictions become final. Indeed, they made evidence available to Bradley in this case. Petitioners maintain, however, that their procedures for providing such evidence are constitutionally adequate and that they have complied with state procedures to the best of their abilities. Petitioners also maintain that Bradley had other state

remedies available to him that he chose to forego in favor of bringing this § 1983 action in federal court. Petitioners therefore contend that Bradley has failed to state a claim for denial of procedural due process.

2. The main question which petitioners ask this Court to consider, and to answer in the negative, is whether state prisoners like Bradley have a *substantive* due process right to obtain evidence from the State after conviction. Substantive due process protects "those rights that are 'fundamental,' that is, rights that are 'implicit in the concept of ordered liberty,'" *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969), "regardless of the fairness of the procedures used to implement them," *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). "Historical practice is probative of whether a procedural rule can be characterized as fundamental." *Herrera v. Collins*, 506 U.S. 390, 408 (1993).

Petitioners maintain that the right of a prisoner, who has been tried and convicted by a jury of his peers and has exhausted his direct appeals, to obtain evidence to attack his conviction is not "implicit in the concept of ordered liberty." The clearest support for this conclusion comes from *Herrera v. Collins*. In *Herrera*, the petitioner claimed that he was actually innocent, based on newly discovered evidence. The Supreme Court analyzed this claim under procedural, not substantive, due process analysis. The Court reasoned that substantive due process analysis would have to rest on the invalid assumption that the petitioner, whose conviction had been finalized and repeatedly affirmed in state and federal post-conviction appeals, was actually innocent. 506 U.S. at 399-400 ("in the eyes of the law, petitioner does not come before the Court as one who is 'innocent,'

but, on the contrary, as one who has been convicted by due process of two brutal murders"). Because assuming the petitioner's innocence would have put "the cart before the horse," the Court examined his claims in terms of procedural due process only. *Id.* at 407 n. 5.

Bradley's substantive due process claim also flies in the face of the Supreme Court's decision in *Arizona v. Youngblood*, 488 U.S. 51 (1998). In *Youngblood*, the Court made clear its "unwillingness to read the 'fundamental fairness' requirement of the Due Process Clause . . . as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Id.* at 58 (citation omitted). A claim for evidence based on substantive due process cannot be squared with this directive.

Finally, recognizing a substantive due process right to evidence after conviction will thrust the federal courts into the difficult role of defining for all 50 States and for the United States government the scope of that right. The federal courts will have to answer a myriad of difficult questions best left to state legislatures and courts:

1. How long and under what conditions must the State preserve evidence that it used at trial to convict the prisoner?

2. How long must the State preserve evidence that it gathered during investigation but did not use at trial because it did not seem informative at the time? Is the State responsible to anticipate changes in technology that might make previously unusable evidence usable?

3. What are the consequences when a State fails to keep a proper chain of custody of the evidence after trial, or allows the evidence to decay, or loses the evidence through inadvertence or neglect?

4. How many times can a prisoner demand production of the same evidence on the ground that new technology may yield new information relevant to his conviction?

5. Who may claim a right to DNA testing — all prisoners, those who committed certain crimes, those serving certain sentences?

6. What showing must a prisoner make to be entitled to DNA testing?

7. Who bears the costs of DNA testing?

See Harvey v. Horan, 285 F.3d 298 (4th Cir. 2002) (Wilkinson, J., concurring in the denial of rehearing and rehearing en banc). The petitioner state officials ask this Court to prevent the federal courts from even starting down the road of attempting to answer all these questions. The consequence to the finality of state court convictions, if these questions are even left in doubt, is potentially catastrophic. Long-term prisoners everywhere will claim a substantive due process right to evidence that States may or may not have in their possession, and they will demand hearings to make the States produce the evidence or explain why they are not able to produce it. Death row inmates will demand indefinite stays of their executions while litigation of these issues is ongoing, just as Bradley has been able to do in this case.

The question whether a prisoner has a procedural or a substantive due process right to evidence after conviction

is exceedingly important and worthy of careful attention. Because it is linked to the first question presented by this case, on which there is a split, it merits certiorari review by this Court. Petitioners therefore request that this Court grant certiorari to consider first whether Bradley has stated a valid due process claim that may be asserted in a § 1983 action and second whether the assertion of such a claim is the functional equivalent of a habeas petition and therefore subject the bar against successive petitions in 28 U.S.C. § 2244(b).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,

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February 20, 2003

No. __-___

In the
Supreme Court of the United States

William H. PRYOR Jr., Attorney General for the State of Alabama; J.C. Upshaw Downs, Director and Chief Medical Examiner, Alabama Department of Forensic Sciences; Joe Hubbard, District Attorney for Calhoun County, Alabama; Calhoun County District Attorney's Office,

Petitioners,

v.

Danny Joe BRADLEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPENDIX

App. 1

United States Court of Appeals,
Eleventh Circuit

Danny Joe Bradley, Petitioner-Appellant,

v.

Bill Pryor, Attorney General for the State of Alabama, etc., Respondents-Appellees.

No. 01-16442

Sept. 23, 2002

Following affirmance of his murder conviction and death sentence, 494 So.2d 772, affirmance of denial of his motion for post-conviction relief, 557 So.2d 1339, and affirmance of denial of his petition for habeas corpus relief, 212 F.3d 559, prisoner brought § 1983 action seeking to compel government to produce evidence for DNA testing. The United States District Court for the Northern District of Alabama, No. 01-01601-B-S, Sharon Lovelace Blackburn, J., dismissed action. Prisoner appealed. The Court of Appeals, Barkett, Circuit Judge, held that action was not functional equivalent of petition for habeas corpus, and thus was not subject to dismissal as second or successive habeas petition filed without requisite authorization.

Reversed and remanded.

Edmondson, Chief Judge, specially concurred and filed opinion.

Birch, Circuit Judge, specially concurred and filed opinion.

Theodore A. Howard, Wiley Rein & Fielding, LLP, Washington, DC, for Petitioner-Appellant.

James Roy Houts, Montgomery, AL, for Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

Appeal from the United States District Court for the Northern District of Alabama.

BARKETT, Circuit Judge:

Danny Joe Bradley, an Alabama prisoner under sentence of death, appeals the district court's dismissal of his suit to compel the government to produce evidence for DNA testing. The court held that Bradley's suit, which was filed pursuant to 42 U.S.C. § 1983, was the "functional equivalent" of a petition for habeas corpus, and should therefore be dismissed as a second or successive habeas petition filed without the requisite authorization from the Court of Appeals. Bradley now appeals that ruling and argues that his suit was properly brought pursuant to § 1983 because his request for the production of evidence neither directly, nor by necessary implication, attacks the validity of his conviction and sentence. We agree, and accordingly reverse the decision of the district court.

BACKGROUND

Bradley was convicted of the murder of his stepdaughter, Rhonda Hardin, in 1983 and sentenced to death. He has unsuccessfully pursued relief from his conviction and sentence through a direct appeal, *see Bradley v. State,* 494 So.2d 750 (Ala.Crim.App.1985); *Ex parte Bradley,* 494 So.2d 772 (Ala.1986), state post-conviction proceedings, *see Bradley v. State,* 557 So.2d 1339 (Ala.Crim.App.1989), and federal habeas corpus proceedings, *see Bradley v. Nagle,* 212 F.3d 559 (11th

Cir.2000). In June, 2001, he initiated the present § 1983 action in the district court to secure production of certain physical and biological evidence the State had gathered in the course of its investigation and prosecution of Bradley for Hardin's murder. Bradley wishes to conduct DNA testing of the evidence, averring that it will yield results establishing or tending to establish his innocence. In his complaint, Bradley sought production of a number of items of evidence, some of which he has since obtained pursuant to a state court order. However, he still seeks two items of evidence that the State used at trial to connect him to the crime. First, he seeks the "rape kit" evidence from the autopsy of the victim, including vaginal, rectal and oral swabs, substance smears, and gastric juices. The smears and gastric juices were found to contain semen and spermatozoa, which at trial the prosecution attributed to Bradley. Second, he seeks production of the clothing worn by the victim when her body was discovered; at trial, the State's expert testified that the clothing contained semen stains. The State claims that both the "rape kit" evidence and the victim's clothing are missing. However, Bradley argued in the district court, as he does here, that he is entitled to discovery to test the factual basis for the state's assertion that it no longer possesses the evidence he seeks. [FN1]

> FN1. The State submitted an affidavit stating that the items Bradley seeks are missing, but Bradley points out that the affidavit evidence is hearsay, and he has not been provided with any opportunity for discovery to develop contrary evidence regarding the availability of the items he seeks.

The magistrate judge recommended dismissing Bradley's § 1983 action, concluding that because Bradley was seeking evidence that might eventually exonerate him,

his suit was the "functional equivalent" of a second habeas petition, over which the district court could not exercise jurisdiction because it did not satisfy the procedural prerequisites of 28 U.S.C. § 2244. The magistrate also denied Bradley's motion for discovery. The district court adopted the magistrate's report and recommendation in its entirety and dismissed the action. The court then issued a certificate of appealability on the sole question now before us [FN2]:

> FN2. We note that this case does not address the question of whether Bradley's claim states a cause of action, or of whether a different result would obtain if a federal stay of execution were implicated. Although the Alabama Supreme Court subsequently stayed Bradley's execution pending the outcome of these proceedings, that is a matter for the state court's discretion, and a stay was not part of the relief that Bradley sought in his § 1983 suit.
>
> Whether a 42 U.S.C. § 1983 action initiated by a state prisoner sentenced to death which seeks to compel the state to produce physical evidence for DNA testing and/or to account for such evidence for the purpose of later asserting a claim of actual innocence or a due process claim under *Brady v. Maryland*, [373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963),] or *Arizona v. Youngblood*, [488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988),] is the "functional equivalent" of a petition for federal habeas corpus.

We review *de novo* the dismissal of an action for lack of subject matter jurisdiction. *Carter v. Rodgers*, 220 F.3d 1249, 1252 n. 3 (11th Cir.2000).

DISCUSSION

The Supreme Court first considered the potential overlap between § 1983 actions and habeas corpus petitions in *Preiser v. Rodriguez,* 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), and held that habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release. *Id.* at 487-90, 93 S.Ct. 1827. Later, in *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), the Court considered under what circumstances an action for damages pursuant to § 1983--in other words, in which the relief requested does not involve **1290* immediate or speedier release--will not lie and must instead be brought as a habeas petition. Sharpening the formula it applied in *Preiser,* the Court explained that the decisive issue is "whether a judgement in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence...." *Id.* at 487, 93 S.Ct. 1827. If it would, the Court held that the § 1983 complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. "But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." *Id.* (emphasis in original).

Bradley argues that his § 1983 suit should be allowed to proceed because success in his suit will not demonstrate the invalidity of his conviction or sentence. We agree. Bradley seeks access, for the purpose of DNA testing, to evidence that he believes is in the State's possession. He prevails in this lawsuit once he has access to that evidence or an accounting for its absence. Nothing in that result necessarily

demonstrates or even implies that his conviction is invalid. As Bradley points out, it is possible that the evidence will not exculpate him, or the proof will show that any unavailable evidence was lost innocently. In that case, he would have no grounds subsequently to pursue a challenge to his conviction or sentence. But even if the evidence, after testing, permits Bradley to challenge his sentence, that challenge is no part of his § 1983 suit. He would have to initiate an entirely different lawsuit, alleging an entirely different constitutional violation, in order to demonstrate that his conviction and sentence are invalid.

The State argues that the only reason Bradley wishes to test the evidence is to mount a subsequent challenge to his conviction and sentence, and that his § 1983 suit is therefore the functional equivalent of a habeas corpus proceeding. That argument finds support in a recent Fourth Circuit decision holding that, in a suit to produce evidence for DNA testing, the fact that the plaintiff intends to use the results of the DNA testing to undermine his conviction means that, under *Heck*, the evidence is properly sought in a habeas corpus proceeding rather than in a suit pursuant to § 1983. *See Harvey v. Horan*, 278 F.3d 370, 375 (4th Cir.2002). However, one member of the *Harvey* panel disagreed with that argument, and pointed out--correctly, in our view--that a plaintiff's successful effort to obtain evidence for DNA testing does not necessarily imply that his conviction and sentence are invalid:

> In this proceeding, Harvey seeks access to the biological evidence held by the Commonwealth's Attorney, and his suit, if successful, would merely result in the Commonwealth's Attorney making the evidence available to him. That act alone--providing Harvey with access to the biological

> evidence relating to his rape conviction--does not "necessarily imply" the invalidity of Harvey's conviction or sentence. [*Heck,*] 512 U.S. at 487, 114 S.Ct. 2364. Although Harvey might use the evidence, at some future date, to initiate a separate action challenging his conviction, future exculpation is not a necessary implication of Harvey's claim in this case.

Id. at 382-83 (King, J., concurring in part). Moreover, although a subsequent change in state law permitted Harvey to obtain the evidence he sought, Judge Luttig wrote in his concurrence to the denial of rehearing en banc that, were the federal proceedings not rendered moot by the change in state law, he would have voted **1291* to hear the case en banc to correct a "fairly clear[ ]" error in the panel opinion. *Harvey v. Horan,* 285 F.3d 298, 307 (4th Cir.2002) (Luttig, J., respecting the denial of rehearing on banc). Judge Luttig wrote:

> I do not believe it even arguable that a post-conviction action merely to permit access to evidence for the purpose of STR DNA testing "necessarily implies" invalidity of the underlying conviction. Indeed, such necessarily implies nothing at all about the plaintiff's conviction. It certainly implies nothing more (and arguably it implies a good deal less) than does an assertion of constitutional right to material and exculpatory information producible under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), which has never been thought necessarily to imply the invalidity of the underlying conviction. The results of any DNA tests that are eventually performed may be inconclusive, they may be insufficiently exculpatory, or they may even be

> inculpatory. That these scientific possibilities exist, in and of itself, suffices to establish that the asserted right of mere access is not a direct, or for that matter even an indirect, attack on one's conviction or sentence. But if this were not enough to establish the point, then it should be that, in order to overturn a conviction based on exculpatory evidence that might appear from any DNA testing, the petitioner would have to initiate an entirely separate action at some future date, in which he would have to argue for his release upon the basis of a separate constitutional violation altogether.

Id. at 308. For the reasons expressed by Judges King and Luttig, we disagree with the Fourth Circuit panel that *Heck* does not permit a § 1983 suit for the production of evidence for the purpose of DNA testing. On the contrary, *Heck* explicitly authorizes a § 1983 action that does not "necessarily imply" the invalidity of the plaintiff's conviction, *see Heck,* 512 U.S. at 487, 114 S.Ct. 2364, and it is clear to us that Bradley's suit does not "necessarily imply" that his conviction is invalid.

The State also contends that a number of Eleventh Circuit decisions support its position that Bradley's suit may proceed only as a habeas corpus petition. First, it notes that in *Felker v. Turpin,* 101 F.3d 95 (11th Cir.1996), and *Hill v. Hopper,* 112 F.3d 1088 (11th Cir.1997), we held that § 1983 challenges to the constitutionality of electrocution as a means of execution were the "functional equivalent" to a petition for habeas corpus and were therefore subject to the procedural requirements governing second or successive petitions. The State argues that these cases cannot be distinguished from the present one, because just as the evidence might

not exculpate Bradley, the plaintiffs in those cases "may not have been given relief," "depending on the district court's rulings and the evidence presented in support of the Eighth Amendment claims." But Alabama is simply pointing out that the plaintiffs might have been unsuccessful in their lawsuits, a consideration that is plainly irrelevant under *Heck*. Again, *Heck* states that the relevant inquiry is "whether a judgement *in favor of the plaintiff* would necessarily imply the invalidity of his conviction or sentence...." 512 U.S. at 487, 114 S.Ct. 2364 (emphasis added). Obviously, if the plaintiff loses, the validity of the conviction or sentence has not been called into question. But *Heck* would be meaningless if the possibility that the plaintiff might lose his § 1983 suit were sufficient to establish that the suit does not necessarily imply the invalidity of the conviction or sentence. That is why the *Heck* inquiry considers the effect on the conviction and sentence if the plaintiff is *successful*. If the *Felker* and *Hill* plaintiffs were successful--in other words, if the court determined that electrocution was an unconstitutional **1292* means of execution--it would "necessarily imply" the invalidity of their sentences of death by electrocution. Accordingly, under *Heck*, a § 1983 suit does not lie in those cases. But as previously discussed, if Bradley is successful in his lawsuit, his conviction and sentence will not be called into question, since the only thing he will have secured is access to evidence.

The other case cited by the State is similarly distinguishable. In *Abella v. Rubino*, 63 F.3d 1063 (11th Cir.1995), the plaintiff argued that the defendants "knowingly and willfully conspired to convict him falsely by fabricating testimony and other evidence against him...." *Id.* at 1064. We held that, under *Heck*, the action did not lie because "[j]udgment in favor of Abella on these

claims [that the defendants unconstitutionally conspired to convict him of crimes he did not commit] 'would necessarily imply the invalidity of his conviction.' " *Id.* at 1065 (quoting *Heck,* 512 U.S. at 487, 114 S.Ct. 2364). By contrast, Alabama cannot show in this case that judgment in favor of Bradley would necessarily imply the invalidity of his conviction.

We note again that Bradley's suit seeks only the production of evidence. There has been no discovery regarding the State's claim that certain items of evidence are missing, but in any event, that claim does not alter the nature of Bradley's suit. We therefore reverse the decision of the district court and remand for further proceedings.

REVERSED AND REMANDED.

EDMONDSON, Chief Judge, specially concurring:

Although I know that other federal circuit courts have reached conclusions inconsistent with my view, I--largely for the reasons stated by Judge Barkett-- agree that Bradley's 42 U.S.C. § 1983 action is not the functional equivalent of a petition for habeas corpus. I write separately to stress that Bradley has at no time in this federal case asked a federal court to enjoin Alabama from executing him or even to stay his execution until his section 1983 case is decided. The lack of a request for a *federal* court to stop or to postpone the State execution is important to my decision.

I hint at no view about whether Bradley's lawsuit actually states a claim upon which relief can be granted.

BIRCH, Circuit Judge, specially concurring:

I concur *dubitante*. If a district court's decision is correct for any reason, then it is due to be affirmed, even though the particular reason given by the district court is erroneous. *See Hempel v. United States,* 14 F.3d 572, 576 (11th Cir.1994); *Collins v. Seaboard Coastline R.R. Co.,* 681 F.2d 1333, 1335 (11th Cir.1982). I am inclined to affirm the judgment based upon my conclusion, tentative though it be, that under the circumstances presented here the petitioner does not enjoy a substantive or procedural due process right to the relief he seeks. Therefore, in my opinion, he does not state a predicate constitutional violation to support his § 1983 claim. However, before a final conclusion should be reached on this unsettled issue, a substantially greater amount of thought and briefing should be pursued: just what rights, if any, does a convicted petitioner, who has exhausted his direct appeals and post-conviction avenues of relief, enjoy relative to discovery and testing of DNA evidence? Perhaps on remand this issue will receive the added scrutiny that it deserves.

United States Court of Appeals,
Eleventh Circuit

Danny Joe Bradley, Petitioner-Appellant,

v.

Bill Pryor, Attorney General for the State of Alabama, etc., Respondents-Appellees.

No. 01-16442

November 22, 2002

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion September 23, 2002, 11th Cir., 2002, ____ F.3d ____).

Before: EDMONDSON, Chief Judge, BIRCH and BARKETT, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

United States District Court
for the Northern District of Alabama

Danny Joe Bradley, Petitioner,

v.

Bill Pryor, Attorney General for the State of Alabama, etc., Respondents.

No. 01-01601-B-S

September 24, 2001

Sharon Lovelace Blackburn, J

FINAL JUDGMENT

On August 3, 2001, the magistrate judge's findings and recommendation was entered and the parties were allowed therein fifteen (15) days in which to file objections to the recommendation made by the magistrate judge. On August 17, 2001, plaintiff filed objections to the magistrate judge's findings and recommendation.

Having carefully reviewed and considered *de novo* all the materials in the court file, the magistrate judge's findings and recommendation, and the plaintiff's objections thereto, the court hereby **ADOPTS** the report of the magistrate judge. The court further **ACCEPTS** the recommendation of the magistrate judge and it is, therefore, **ORDERED, ADJUDGED AND DECREED** that:

(1) plaintiff's objections are **OVERRULED**; and

(2) the State of Alabama's motion to dismiss this action for want of subject matter jurisdiction is **GRANTED**.

DONE this 24th day of September, 2001.

SHARON LOVELACE BLACKBURN

United States District Judge

United States District Court
for the Northern District of Alabama

Danny Joe Bradley, Petitioner,

v.

Bill Pryor, Attorney General for the State of Alabama, etc., Respondents.

No. 01-01601-B-S

August 3, 2001

Paul W. Greene, M.J.

MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATION

Danny Joe Bradley, an inmate in the custody of the state of Alabama under a sentence of death imposed in Calhoun County, Alabama initiated this civil action pursuant to the provisions of 42 U.S.C. § 1983 contending that J. C. Upshaw Downs, M.D., the Director of the Alabama Department of Forensic Sciences, Joe Hubbard, the District Attorney for Calhoun County, Alabama, the "District Attorney's Office for Calhoun County" and Bill Pryor, Attorney General for the State of Alabama, have violated rights secured by the United States Constitution by denying him "access [to] critical serological evidence from [his] criminal trial or in the alternative, [failing to provide] adequate proof of destruction." (Document #1, ¶ 17). The matter is before the magistrate judge pursuant to the provisions of 28 U.S.C. § 636(b); Rule 72(b) of the Federal Rules of Civil Procedure; LR 72.1(a)(2)(B), (b)(3)(A), 4(B) and (c); and the General Orders of Reference dated July 25, 1996, May 8,1998, as amended July 27, 2000 for consideration of the July 2, 2001 Motion

to Dismiss filed by the defendants. (Document #3). Bradley has filed a response to the motion. (Document #5). The motion to dismiss is due to be GRANTED.

BACKGROUND

Danny Joe Bradley was convicted in Calhoun County, Alabama for the January 24, 1983 rape and murder of his twelve year old step daughter and sentenced to death. Bradley appealed his conviction which was affirmed by the Alabama Court of Criminal Appeals on November 26, 1985 and again by the Supreme Court of Alabama on July 25, 1986. The United States Supreme Court denied Bradley's petition for certiorari on March 9, 1987. Bradley then sought collateral review of his conviction and sentence in the state court with a petition filed under, Temporary Rule 20, Alabama Rules of Criminal Procedure.[1] Bradley was denied relief by the trial court and the denial. The denial of relief was affirmed by the Alabama Court of Criminal Appeals in 1989. *Bradley v. State*, 557 So.2d 1339 (Ala. Crim. App. 1989). The Alabama Supreme Court denied a petition for writ of certiorari. In 1990 the United States Supreme Court denied a petition for writ of certiorari. *Bradley v. Alabama*, 498 U.S. 881, 41 S.Ct. 216, 112 L.Ed.2d 175 (1990). Bradley then filed a 1993 federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Alabama. The petition was denied by United States District Judge Sharon Lovelace Blackburn in January 1999. The denial of relief was affirmed by the Eleventh Circuit Court of Appeals on May 16, 2000. *Bradley v. Nagle*, 212 F.3d 559 (11th Cir. 2000). A petition for rehearing en banc was denied in July of 2000.

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[1] Now Rule 32.

During Bradley's trial the state introduced, among other evidence, testimony that a pathologist "... had taken swab and substance smears from [the victim's] mouth, rectum, and vagina. He also removed the gastric contents from [the victim's] stomach and turned them over to a toxicologist." *Bradley*, 212 F.3d at 559. The state produced testimony that a red, white and blue sheet contained a stain which included spermatozoa and that a white blanket had two stains which included fecal matter and spermatozoa. A blue towel discovered in a bathroom during a search of Bradley's home revealed vaginal semen stains. The inside of the victim's pants contained a stain consistent with fecal matter and semen. The testimony of a forensic serologist linked Bradley, a non-secreter of the H antigen, to the semen swabs taken from the victim's rectum. Bradley's blood type was consistent with the seminal stains found on the bedding, including a pillowcase. *Id.* There is little question that the serological evidence was an important component of the state's case against Bradley. Bradley's appeal, his Rule 32 petition and his § 2254 petition all raised constitutional claims premised upon the state's due process obligation under *Brady v. Maryland*, 373 U.S. 83 (1963)[2]

According to exhibits filed with the current complaint, as early as July 1996 Bradley was aware that the Innocence Project, affiliated with the Cardoza School of Law, was actively assisting him in his effort to obtain DNA testing of the evidence gathered during the investigation.[3] The Innocence Project had specifically

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[2] The claim related to other evidence allegedly not disclosed by the state. The issue, however, was said to evolve from the same constitutional doctrine which Bradley contends establishes his present claim to a constitutional tort under § 1983

[3] Bradley had contacted the Innocence Project in 1995. (Document #1, paragraph #28).

requested that the Department of Forensic Sciences of the State of Alabama preserve the "sex assault kit" which included the vaginal, rectal and throat swabs of the victim as well as other evidence including the victim's pants and bedding be preserved. As early as August 6, 1996 while his § 2254 petition was pending in this court, Bradley, presumably his habeas counsel and the Innocence Project, knew that the State of Alabama had affirmatively stated that a search of the Birmingham laboratory of the Alabama Department of Forensic Sciences had failed to locate the evidence referenced in the July 1996 letter including the "sex assault kit." (Exhibit F to Bradley's complaint). Despite a clear understanding that such evidence "... may be exculpatory and form the basis of post-conviction litigation [and that he] ... [could] obtain a court order ensuring that the evidence continue[d] to be preserved," Bradley did not seek the intervention of this court in which his "post-conviction litigation" was actually pending nor did he seek mandamus or injunctive relief from the Alabama courts. (Exhibit #F, letter from the Innocence Project to Carlos Rabren, Director of the Alabama Department of Forensic Sciences dated July 18, 1996).[4] In a letter dated

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[4] In his application to the Alabama Supreme Court for a stay of execution, Bradley asserts that on July 10, 1995 "... [the court] ruled that it would not hold an evidentiary proceeding [on Bradley's 2254 petition]." (Document #9, Exhibit B, p.3). If Bradley intends this reference to relate to his inability to raise the claim he now makes here in the § 2254 petition in 1995 the contention is at best misleading. When Bradley's petition was filed he included a general request that "...2 [the court] conduct a hearing at which proof may be offered in support of the allegations and claims...." (93 AR-0985-S, document #1, p.23, ¶ IV(2)) United States District Judge William M. Acker, Jr. entered a scheduling order which provided *inter alia* that "petitioner shall have the burden to allege and demonstrate that the petitioner did not receive a full, fair and complete hearing in state court and that

those proceedings are not a sufficient basis for determining the issues in this petition. Failure to do so will result in this court's examination of the record of the state court. Any request for an evidentiary hearing must be made within the time allowed for briefing. At that point the court will consider whether the matter should be set down for an evidentiary hearing." (AR-0195-S, document #3, ¶ F). In his amended petition for habeas corpus relief filed in August of 1993 Bradley repeated his generalized prayer for relief in ¶ IV. (See amended petition, exhibit 2 to motion of petitioner Danny Joe Bradley to supplement the record on appeal contained within 93-B-0958-S). In his brief, however, Bradley observed that the holding of an evidentiary hearing is discretionary. (Document #26, 93-AR-0958-S). Bradley stated

> his claims in the amended petition raise questions of law or mixed questions of law and fact, which are subject to preliminary review by this court without any `presumption of correctness' according to the rulings of the state courts. To the extent that petitioner's claims rest upon characterizations of the factual record which are contrary to explicit or implicit findings of fact rendered by the state courts, petitioner showed in the amended petition or shows herein that those findings of fact lack `fair support' in the record and are thus erroneous.... Although petitioner has suggested that the court may find an evidentiary hearing desirable in light of the issues raised herein--see amended petition at 63--he does not concede that relief which he has sought cannot be granted based upon the record as it presently exists....

(Document #26, at pp.15.16) (emphasis added).

At the July 10, 1995 status conference during which Bradley recently has stated before the Alabama Supreme Court that the court had "ruled" that it would not hold an evidentiary proceeding the question of a hearing arose only in the context of oral argument related to the § 2254 petition. Indeed, Bradley's counsel in Bradley's presence affirmatively stated that Bradley was not "clamoring for an evidentiary hearing" because the two transcripts of separate proceedings in the state court provided a complete record. At no time did Bradley attempt to establish that the record upon which the state court's conclusions were to be assessed was inadequate. *Keeney v.*

September 26, 1997 a representative of the Innocence Project wrote the Piedmont Police Department demanding that evidence be preserved observing once again that "...[a DNA test] may be exculpatory and form the basis of post-conviction litigation [and that] ..., we can obtain a court order ensuring that the evidence continues to be preserved."[5] (Exhibit A, Letter dated September 26, 1997). No prayer for relief was made to this court nor the

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Tamayo-Reyes, 504 U.S. 1, 112 L.Ed.2d 318(1992). If Bradley now asserts that the "ruling" to which he refers precluded an amended petition or a request for a hearing, the assertion is simply wrong. Indeed, as Bradley himself had noted earlier in the § 2254 proceeding in an affidavit "(4)I have been advised, and understand, that under the currently applicable decisions of the Supreme Court of the United States and the federal statutes and rules governing federal habeas corpus proceedings, any ground for the issuance of the writ that are not timely raised in the pleadings filed by counsel on my behalf in this **proceeding** may be deemed waived, and that subsequent attempts to obtain federal habeas corpus relief **after the final resolution of this proceeding** may be deemed to constitute an `abuse of the writ' ...." (Document #15, ¶ 4, 93-AR-0958-S). (Underlined in original, bold and italics added).

Bradley knew that his § 2254 petition opportunities dwindled after final resolution of the petition. Despite that knowledge he did not seek to amend the petition to add the current claim, request discover or ask for a hearing.

[5] There can be little question that Bradley, had he chosen to do so, could have sought the very order the Innocence Project represented to the Department of Forensic Sciences and the Piedmont Police Department that he could seek. See 28 U.S.C. § 841(q)(9) and *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936, 119 L.Ed.2d 1936(1999) (*Brady* material ordered produced for the first time by defendant federal court during a 2254 proceeding). Bradley also could have moved for an evidentiary hearing in the United States District Court for the Northern District of Alabama where his petition was pending and amended his habeas corpus petition. 28 U.S.C. § 2254(2)(A)(ii), (2)(B). He did neither.

Alabama courts. On June 26, 2001, four years and eleven months after first informing the state that DNA testing might produce evidence which "may be exculpatory," and learning that the state contended it did not have all the evidence he sought Bradley filed this § 1983 action.[6]

THE COMPLAINT:

Bradley's complaint acknowledges that on August 6, 1996 he, or more properly the Innocence Project, was on notice that the evidence, including the "sexual assault kit," could not be found at the Birmingham laboratory of the Alabama Department of Forensic Sciences. (Complaint, ¶ 29, unnumbered p.9). Bradley states in his complaint, however, that "..., there is no documented confirmation of the destruction of RH's collected gastric juices and RH's vaginal, rectum and oral swabs and substance smears."[7] (*Id.*) Bradley avers that on June 27, 2000 the Innocence Project "contacted [the Assistant Attorney General] to request the release of biological evidence for the purpose of DNA testing." (*Id.*, ¶ 32). The

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[6] Bradley filed this action less than 30 days before his scheduled execution.

[7] The claim appears to be that Bradley has a constitutional right to a search for evidence which the state has affirmatively stated it does not have. The denial of access to this evidence, assuming a constitutional right to access would be irrelevant if the evidence does not exist. Bradley does not suggest what the appropriate result of such an order may be nor how to assess the quality of the search this court might order. "(Section] 1983 is not itself a source of substantive rights 'but merely provides' a method for vindicating federal rights elsewhere conferred." *Graham v. Conner* 490 U.S. 386,393-394, 119 S.Ct. 1865, 104 L.Ed.2d 443 (quoting *Baker v. McCallom*, 443 U.S. 137, 144 n.3, 99 S.Ct. 2689,61 L.Ed.2d 433 (1979). Bradley's "accounting" claim either is based in *Brady* which is moot or *Youngblood*, supra, which is a habeas claim.

State did not consent to testing, however, because the request had not come from Mr. Bradley's counsel of record, Theodore Howard. (*Id.*, ¶ 32).[8] The state also objected to the testing of only selected items. (Document #1, Exhibit J).

On September 12, 2000, after Mr. Howard made a request, the Assistant Attorney General undertook another investigation and informed Mr. Howard that "... he was unable to locate the biological evidence, and therefore he presumed the evidence to be lost." (*Id.*, ¶ 33). Bradley states that the Innocence Project then independently contacted John Case at the Department of Forensic Sciences in Jacksonville, Alabama and learned that Mr. Case "possessed hair evidence from the plaintiff's case."[9] Bradley claims that the hair evidence was collected from the victim's pubic combings and clothing. On February 16, 2001 Howard requested DNA testing on the hair evidence located in Jacksonville, Alabama. Bradley contends that as of June 26, 2001 "... neither [sic] Mr. Pryor, Mr. Downs, Mr. Hubbard, the District Attorney's Office for Calhoun County, nor the Alabama Attorney General's office have provided plaintiff access to [the victim's] vaginal, rectal and oral swabs and substance smears, gastric juices, pants or other biological evidence related to plaintiff's case." (*Id.*, ¶ 35). Bradley's

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[8] While the phrase "we represent Danny Joe Bradley ..." appears frequently in correspondence from the Innocence Project, there was no notice of appearance filed in the § 2254 action which remained pending for four years after the first contact with the state by the Project. There does not appear to have been any collateral relief petition in state or federal court in which the Project responded Bradley.

[9] Case in an affidavit submitted in a related state court proceeding noting that the Innocence Project had been aware of the evidence in his possession since a telephone call in October 1996 which was followed by a November 1996 letter.

claim that he has been denied access to evidence has two parts. First, he claims that the state has refused DNA testing of the evidence it has retained. Second, Bradley appears to argue that he has a constitutional right to an "accounting" for the evidence the state says it does not have.

Mr. Bradley's first "claim for relief" is predicated upon an unspecified violation of "due process of law." Mr. Bradley avers that by refusing to "... search for and/or release vaginal, rectal and oral swab and substance smears, collected gastric juices from RH and RH's pants for DNA testing, and thereby preventing plaintiff from gaining access to exculpatory evidence which could exclude him as a perpetrator [defendants have deprived plaintiff of Due Process of Law]." (*Id.*, ¶ 37). Mr. Bradley's second claim for relief avers that "... defendants have deprived plaintiff of the opportunity to make a conclusive showing that he is innocent of the crime for which he is currently incarcerated, in violation of the due process clause of the Fourteenth Amendment."[10] Mr. Bradley's third claim for relief is based upon his contention that the defendants have deprived [him] of the opportunity to make a conclusive showing of actual innocence prior to the imposition of a death sentence in violation of the cruel and unusual punishment clause of the Eighth Amendment. Mr. Bradley's fourth claim for relief suggests that defendants have deprived him of his right to present evidence of his innocence in state court, federal court or before the Alabama State Pardon Board, in violation of the confrontation and compulsory process clauses of the Sixth Amendment of the United States Constitution. Mr.

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[10] Mr. Bradley's "due process" claim in ¶ 37 may or may not be grounded in the Fifth Amendment.

Bradley's fifth claim for relief is an otherwise unspecified allegation that he has been deprived of "the opportunity to effectively litigate his claim that he is innocent of the crime for which he is currently incarcerated, thereby preventing [him] from access to state and federal courts to obtain legal relief, in violation of the due process and equal protection guarantees under the Fourteenth Amendment." Finally, Bradley avers in his sixth claim for relief that by refusing to search for and permit him access to biological evidence the defendants "... have deprived plaintiff of his right to avail himself of the opportunity to apply for executive clemency and the function that executive clemency serves in preventing the violation of constitutional rights will arise from the continued incarceration of an inmate who can make a showing of actual innocence." (*Id.*,¶ 47).

Defendants' motion to dismiss (document #3) is grounded in both Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) asserting that the court lacks subject matter jurisdiction over a cause of action which on its face does not state a claim upon which relief can be granted.

INTERVENING EVENTS

The eleventh hour filing of Bradley's § 1983 complaint led to an accelerated scheduled for consideration of the state's motion to dismiss. Attorneys for each side diligently submitted briefs and authorities related to the pending motion. A number of intervening events, occurring principally in the Alabama courts, however, have modified both the schedule and the nature of the state's motion to dismiss. First, on July 9, 2001 the Circuit Court of Calhoun County, Alabama upon the *ex parte* motion of the state ordered the release of evidence for DNA testing to Dr. Edward Blake, a "scientist selected by Danny Joe Bradley...." (Document #7, Exhibit A, pp.2-

3). The evidence included (a) a white blanket sheet with fecal/semen stains, (b) a red, white and blue piece of bedding with fecal/semen stains, and (c) pubic hair combings of the victim. (*Id.*). Second, on July 13, 2001, the Supreme Court of Alabama ordered a stay of execution. On July 19, 2001 the state filed in this action and with the Alabama Supreme Court a report of Larry Huyes, a forensic scientist, finding that the fecal/semen stains on the white blanket matched the genetic markers of Danny Joe Bradley, the victim, and did not match Bradley's wife. In the submission to the Alabama Supreme Court the state sought to vacate the stay of execution.[11] Bradley did not respond to the state's reply to [Bradley's] opposition to motion to dismiss nor the state's contention that the issue of release of evidence was moot. (See document #7, ¶ a). Instead Bradley filed a motion for leave to conduct limited deposition discovery and requested the scheduling of an evidentiary hearing. (Document #13). In his motion for discovery Bradley argues that his "complaint seeks production of this `missing' evidence or, at a minimum, a definitive explanation from the state as to how and when this crucially-important evidence was lost or destroyed and as to the identity of the person or persons responsible." (Document #13, ¶ 3). He seeks to determine how the state undertakes to manage and dispose of physical and biological evidence in general and specifically to determine "all steps taken by officials, employees or agents of the department, from the date of the Innocence Project's initial inquiry on Mr. Bradley's behalf in 1996 up to the present, to try--albeit unsuccessfully to locate the `missing' items of evidence of which Mr. Bradley has sought production for the purposes

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[11] It would appear that Dr. Edward Blake has not completed his analysis of the material provided to him.

of DNA testing." (*Id.* at ¶ 5). Significantly, Mr. Bradley seeks a hearing and the discovery "... regarding the relief--if any--as to which Mr. Bradley may be entitled to the extent that it is concluded that the key evidence he seeks for testing has, in fact, been lost or destroyed by the state." (*Id.* at ¶ 5).[12]

APPLICABLE LAW

Rule 12(b)(1)--Subject Matter Jurisdiction

The defendants contend that the United States District Court for the Northern District of Alabama lacks subject matter jurisdiction over Bradley's § 1983 complaint because the action is a petition for writ of habeas corpus masquerading as a civil rights case. If Bradley's pleadings are characterized as a prayer for habeas corpus relief, he is required, as a matter of law, to first obtain the permission of the Eleventh Circuit Court of Appeals to file a successive habeas corpus petition before he may proceed. (28 U.S.C. § 2244(b)(3)(A)).[13] A motion to dismiss under Federal Rule of Civil Procedure 12(b)(l) attacks the jurisdictional sufficiency of the complaint as a matter of law. *Connelly v. Gibson*, 355 U.S. 41,45-46,78 S.Ct. 99, 101-102,2 L.Ed.2d 80 (1957);*Luckey v. Harris*, 860 F.2d 1012, 1016(11th Cir. 1988), *rehearing denied en banc*, 896 F.2d 479(11th Cir. 1989), *cert. denied*,

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[12] For the reasons set forth below any relief must come under 28 U.S.C. § 2254.

[13] 28 U.S.C. § 2244(b)(3)(A) provides:

> Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate Court of Appeals for an order authorizing a district court to consider the application.

495 U.S. 957, 110 S.Ct. 2562, 109 L.Ed.2d 744 (1990). Once challenged, the burden of establishing a federal court's subject matter jurisdiction rests with the party asserting the jurisdiction. *Thomson v. Gaskill*, 315 U.S. 442, 62 S.Ct. 673, 86 L.Ed. 951 (1942); *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980). In determining whether the court properly exercises subject matter jurisdiction, the court is to "consider the allegations of the complaint as true." *Williams v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981). Unlike a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissals for lack of subject matter jurisdiction do not involve a consideration the merits of the claim. (*Id.*, at 413).

Attacks on subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) come in two forms: "facial attacks" and "factual attacks." *Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990). Facial attacks on the complaint "require [ ] the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Lawrence*, 919 F.2d at 1529 (quoting *Menchaca v. Chrysler Credit, supra*, in turn citing *Mortenson v. First Federal Savings and Loan Association*, 549 F.2d 884, 891 (3d. Circ. 1977)). "Factual attacks," on the other hand, challenge "the existence of the subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleading, such as testimony and affidavits, are considered." *Id.* If the facts necessary to sustain jurisdiction do not implicate the merits of the plaintiff's cause of action, then:

> The trial court may proceed as it never could under Rule 12(b)(6) or Federal Rules of Civil Procedure

> 56. Because at issue in a factual 12(b)(l) issue is the trial court's jurisdiction--its very power to hear the case--there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumption of truthfulness attaches to plaintiff's allegations, and the existence of disputed material fact will not preclude the trial court from evaluating for itself the merits of the jurisdictional claim.

Lawrence, 919 F.2d at 1529, quoting *Mortenson v. First Federal Savings and Loan*, 549 F.2d at 891.

Here, without regard to the underlying merits of Bradley's purported § 1983 claim the jurisdiction of this court is subject to a factual attack.[14]

Defendants contend that the Eleventh Circuit Court of Appeals has on more than one occasion turned back efforts to circumvent the successive petition bar of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) citing *inter alia Felker v. Turpin*, 83 F.3d 1303 (11th Cir. 1996).[15] The defendants also argue that the holding of the United States Supreme Court in *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) as explained in *Abela v. Rubino*, 63 F.3d 1063,

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[14] The orders of the Alabama Supreme Court and the Calhoun County Circuit Court are considered in conjunction with pleadings provided by Bradley in reaching limited factual conclusions with respect to the court's jurisdiction. *Bryant v. Avdo Brands, Inc.*, 187 F.3d 1271, 1276 (11th Cir. 1999).

[15] It is noted parenthetically that the effective date of the AEDPA and the Eleventh Circuit's holding in *Felker* predated Bradley's first learning that the state claimed that it could not locate the evidence which is the subject of the pending litigation.

1066 (11th Cir. 1995) forecloses § 1983 relief under the facts presented here. (Document #3). In *Felker*, a Georgia death row inmate filed a § 1983 action one week prior to his scheduled execution alleging that the use of the electric chair to carry out a death sentence violated the constitutional proscriptions against cruel and unusual punishment under the Eighth and Fourteenth Amendments. *Felker*, 101 F.3d at 96, citing *Gomez v. United States District Court*, 503 U.S. 653, 112 S.Ct. 1652, 118 L.Ed.2d 293 (1992) and *Lonchar v. Thomas*, 517 U.S. 314, 116 S.Ct. 1293, 134 L.Ed.2d 440(1996), the Eleventh Circuit Court of Appeals concluded that the purported § 1983 claim was subject to the procedural requirements for bringing a second or successive habeas petition. The Circuit Court observed that a § 1983 plaintiff cannot escape the rules regarding second or successive habeas petitions simply by filing his challenge to his sentence as a § 1983 claim. Finding the Eighth Amendment cruel and unusual punishment challenge to be the "functional equivalent" of a second habeas petition, the Eleventh Circuit concluded that the district court was without authority to consider the request for relief. *Felker* sought a declaration of unconstitutionality and an injunction prohibiting the use of the electric chair as a means for carrying out the death penalty. The defendants here contend that "... Bradley's complaint attacks the validity of his sentence and conviction, [and that] this matter is a petition for writ of habeas corpus in § 1983 clothing." (Document #5, p.4). As noted by the defendants in *Preiser v. Rodriquez*, 411 U.S. 475, 498 (1973) the ultimate issue "centers upon whether the relief a plaintiff seeks is `a determination that he is entitled to immediate release or expedient release from imprisonment.'" Cited in

Parisie v. Morris, 873 F. Supp. 1560, 1564 (N.D. Ga. 1995).[16]

Bradley's reply to the state's jurisdictional challenge conflates the Rule 12(b)(l) and Rule 12(b)(6) issues. Bradley concludes that this court has subject matter jurisdiction because he seeks "prospective injunctive relief to remedy violations of his federal rights and ..., if successful, such an injunction [would not practically invalidate an outstanding conviction or sentence]...." (Document #5, p.10). Bradley contends that an order for testing is not itself a finding that the conviction is valid. He also claims that because he wishes to find evidence to prove himself "actually innocent" he states a § 1983 cause of action.

Habeas Corpus-§ 1983

The primary authority upon which Bradley relies for his contention that § 1983 is the proper vehicle for his claim is a district court opinion in which the Innocence

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[16] The defendants contend that the true nature of the § 1983 complaint is revealed by "its timing." (*Id.* at p.5.) The defendants observe that the Innocence Project has been involved in Bradley's case since October 1995 and did not seek § 1983 relief until four months after the State of Alabama had moved for an execution date and one and one-half weeks after the Alabama Supreme Court had set the July date of execution. (*Id.*) The fact that the timing is indeed suspicious is essentially irrelevant to a Rule l2(b)(l) analysis. If Bradley seeks habeas corpus "relief' as did *Felker*, the successive petition bar to a proceeding in the Northern District of Alabama is applicable. If Bradley seeks something else and that something else is cognizable under § 1983, there is subject matter jurisdiction at least insofar as Rule 12(b)(l).

Project asserted the same claims.[17] *In Harvey v. Horan*, 119 F. Supp. 581, 583 (E.D. Va. 2000) the court concluded that a plaintiff's 1983 action was not subject to the successive petition bars of § 2254 because "... the plaintiff [did] not seek immediate release from prison and disclaim[ed] any challenge to his conviction at this time, conceding that DNA tests may show his conviction was valid. The denial of access to possibly exculpatory evidence states a claim for due process and gives [the] court jurisdiction under 42 U.S.C. § 1983...." The lynchpin of the *Harvey* analysis and that urged by Bradley here is the contention that success on the merits of the § 1983 action does not itself"...necessarily demonstrate the invalidity of [the] conviction, so therefore the plaintiff appropriately [brings] this action under § 1983." *Harvey*, 119 F. Supp. at 582.

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[17] Indeed, the claims made in *Harvey v. Horan*, 119 F. Supp. 581. 583 (E.D. Va. 2000) are verbatim the claims made here. "Plaintiff's claims for relief are: (1) that the defendant has deprived plaintiff of due process under the Fourteenth Amendment by refusing to search for and provide the evidence for DNA testing; (2) that by refusing to provide evidence for DNA testing, defendant has deprived plaintiff an opportunity to show he is innocent, in violation of the Fourteenth and Fifth Amendments; (3) that by refusing to search for and provide evidence for DNA testing plaintiff cannot make a truly persuasive showing of innocence, in violation of the cruel and unusual punishment clause of the Eighth Amendment; (4) that by refusing to search for and provide the evidence for DNA testing, plaintiff is deprived of his right to present evidence of innocence before a court or pardon board in violation of the confrontation and compulsory process clauses of the Sixth Amendment; (5) that by refusing to search for and provide evidence for DNA testing, defendant has deprived plaintiff of the opportunity to litigate his claim that he is innocent, effectively denying him access to the courts in violation of the Fourteenth and First Amendment and (6) that the defendant has deprived plaintiff of availing himself of the opportunity to seek clemency. ..." *Harvey*, 119 F. Supp. at 582.

Harvey addresses the first prong of the relief sought by Bradley in the present case. That is, the district court entered an order directing that evidence which the state had refused to produce be provided to Harvey for the purposes of testing. The Circuit Court of Calhoun County has provided Bradley with precisely that relief. Bradley has clearly availed himself of that relief by naming his scientist and taking possession of the material to be tested. Bradley has insisted, he seeks only injunctive relief in this court which is identical to that which he has now obtained in the Circuit Court of Calhoun County. That aspect of his § 1983 complaint is moot.[18] Article III of the Constitution limits the jurisdiction of the federal courts to consideration of certain "cases" and "controversies." United States Constitution, Article III, § 2. The doctrine of mootness is derived from this limitation because an action that is moot cannot be characterized as an active case or controversy. *See Church of Scientology Flag Serv. Org. v. The City of Clearwater*, 777 F.2d 598, 604 (11th Cir. 1985), *cert. denied*, 476 U.S. 1116, 106 S.Ct. 1973, 90 L.Ed.2d 656 (1986). A case or controversy, once initiated, becomes moot "when the issues presented are no longer `live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969). A federal court must resolve questions of mootness as a jurisdictional matter. *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971). In the present case the court's jurisdiction to consider this matter is in question by virtue of the motion of the defendants. This action moreover is not "capable of

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[18] Obviously the complaint would not be moot in the event Bradley sought damages. *Heck v. Humphrey*, however, will not permit Bradley to resuscitate the claim as a damages suit.

repetition, yet evading review" which sustains an action for injunctive relief beyond a particular event. *See Southern Pack Terminal Company v. Interstate Commerce Comm`n*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911). Bradley has obtained complete relief as to the evidence he had alleged the state had in its possession and would not produce for testing. Assuming, without agreeing, that *Brady* analysis of *Harvey v. Horan* actually establishes a § 1983 claim in this context. There is no question that the claim is moot here.

In correspondence directed to representatives of the state of Alabama the Innocence Project reporting to represent Bradley frequently invoked references to the constitutional requirements of *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) in admonishing authorities to preserve evidence.[19] In this court Bradley has repeated that *Arizona v. Youngblood* stands for the proposition that "police violate due process when they, in bad faith, fail to preserve evidentiary material...." (Document #5, p.7). In this court Bradley also avers that "defendants' recent assertions that the most critical evidence from plaintiff's case is unavailable for testing are astounding. While plaintiff is at present unaware of what evidence has been lost or destroyed or when such evidence was destroyed or became missing, he may also very well have a bad faith destruction of evidence claim against defendants pursuant to the Supreme Court's holding in *Youngblood*." (*Id.* at pp.8-9). Bradley's pending motion for discovery relates exclusively to a *Youngblood* claim. Assuming that the reasoning of

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[19] These admonitions were made despite responses from the individuals to whom they were directed stating that they did not possess the evidence to which Bradley referred.

Harvey v. Horan provides a *Brady* based § 1983 fig leaf to successive § 2254 petition, *Youngblood* will not. The destruction of evidence principles are articulated in *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) and *Youngblood*. Under the two-prong *Trombetta* test, the government violates a defendant's due process when "(1) it destroy's evidence whose exculpatory significance is `apparent before' destruction; and (2) the defendant remains unable to `obtain comparable evidence by other reasonably available means.'" *Trombetta*, 467 U.S. at 489, 104 S.Ct. at 2534. The court in *Youngblood* extended *Trombetta* to provide that if the exculpatory value of the evidence is indeterminate and all that can be confirmed is that the evidence was "potentially useful" for the defense, then a defendant must show that the government acted in bad faith in destroying the evidence. *Youngblood*, 488 U.S. at 58, 109 S.Ct. at 337-38. The bad faith inquiry "must necessarily turn on the [government's] knowledge of exculpatory value of the evidence at the time it was lost or destroyed." *Youngblood*, 488 U.S. at 57, 109 S.Ct. at 336. See also, *United States v. Brown*, 9 F.3d 907, 909 (11th Cir. 1993). Under *Harvey's Brady* analysis, the purported distinction between a § 1983 action and a § 2254 action is found in the nature of the relief sought. According to *Harvey* the relief is "merely" an injunction directing that evidence be provided to a plaintiff for analysis which may or may not result in a challenge to the underlying conviction. Under *Youngblood*, however, unlike cases in which the prosecutor fails to disclose *Brady* material, where a court may order a new trial at which the undisclosed evidence can be introduced, the final disposition of evidence that is central to the case may permanently deprive the defendant of due process. If done in "bad faith" the remedy can only be to vacate the conviction. A finding of bad faith unequivocally "... would

necessarily imply the invalidity of [Bradley's] conviction or sentence...." *Heck v. Humphrey*, 512 U.S. at 486, 114 S.Ct. at 2372. Bradley's discovery requests and remaining prayer for relief sounds exclusively in habeas corpus.

Bradley argues that he is entitled to discovery in order to provide him with an opportunity for whatever relief is available. That relief is found in habeas corpus. The discovery aspect of his motion is resolved under Rule 6(a) of the rules applicable to § 2254 petitions. Indeed, Bradley's complaint becomes in the end, only a civil rights complaint which serves as a discovery vehicle for a habeas corpus petition. Bradley is entitled to invoke the processes of the discovery available under the Rules of Civil Procedures if, and to the extent, a district court in the exercise of its discretion and for good cause shown grants leaves to do so. Unlike other federal civil litigants, a habeas petitioner must show "good cause" in order to conduct discovery. A showing of good cause is shown "[w]here specific allegations before the court show reason to believe that the petitioner may, if the facts are filly developed, be able to demonstrate that he is ... entitled to relief." *Bracey v. Gramley*, 420 U.S. 899, 908-09, 117 S.Ct. 1793, 138 L.Ed.2d 97 (quoting *Harris v. Nelson*, 394 U.S. 286, 300, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969)). The Eleventh Circuit Court of Appeals can find that Bradley is entitled to pursue his § 2254 claim and direct this court to permit discovery in order to prove his claim. The Circuit Court may also consider Bradley's procedural default, if any, in deciding whether to grant a successive petition. Under the clear instruction of the Eleventh Circuit Court of Appeals in *Felker v. Turpin*, 83 F.3d at 1305, this court lacks subject matter jurisdiction to consider Mr. Bradley's § 1983 claim because it is in fact the "functional equivalent" of a § 2254 petition. Bradley must move in the Eleventh Circuit Court of Appeals for an order

authorizing the district court to consider his prayer for relief.[20]

RECOMMENDATION

After consideration of the complaint, the briefs of the parties and the applicable law it is RECOMMENDED that the motion of the state of Alabama to dismiss this action for want of subject matter jurisdiction be GRANTED. Bradley's motion for leave for discovery (document #13) is DENIED.

The clerk is DIRECTED to serve a copy of the magistrate judge findings and recommendation upon counsel for the parties.

The parties are DIRECTED to Rule 72(b), Federal Rules of Civil Procedure.

As to the foregoing it is SO ORDERED this the 3rd day of August, 2001.

PAUL W. GREENE
UNITED STATES MAGISTRATE JUDGE

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[20] Matters raised in the 12(b)(6) context in this court including statute of limitation defenses are appropriately considered by the Eleventh Circuit Court of Appeals in the procedural default context.

Supreme Court, U.S.
FILED
MAR 26 2003
CLERK

No. 02-1237

IN THE

Supreme Court of the United States

WILLIAM H. PRYOR, JR., *et al.*,

Petitioners,

v.

DANNY JOE BRADLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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27 pp

QUESTION PRESENTED

Following unsuccessful pursuit of state and federal post-conviction relief from his conviction and death sentence for the first-degree sexual assault/murder of his stepdaughter, Rhonda Hardin, respondent Danny Joe Bradley commenced a federal civil rights action, pursuant to 42 U.S.C. § 1983, seeking to compel petitioners' production of certain items of key physical and biological evidence, in order to allow for the conducting of DNA testing. The federal district court dismissed respondent's action for lack of subject-matter jurisdiction, holding that respondent's Section 1983 claim is the "functional equivalent" of an impermissible repetitive petition for habeas corpus, because in seeking to compel production of evidence for purposes of potentially-exculpatory DNA testing, respondent was directly or by necessary implication attacking the validity of his underlying conviction and sentence. A unanimous panel of the Eleventh Circuit Court of Appeals reversed, holding that under this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), respondent's Section 1983 claim is clearly not the "functional equivalent" of a habeas claim. Although the Court of Appeals required post-argument supplemental briefing on the question of whether respondent's Section 1983 claim was premised upon a cognizable procedural or substantive due process right of post-conviction access to potentially-exculpatory evidence, the Court ultimately declined to address or decide that issue.

The question presented is:

Whether a "compelling reason" exists for this Court to review the decision below, where no genuine and meaningful conflict exists between that decision and the other federal appellate decisions invoked by petitioners, and where the important federal constitutional question underlying respondent's Section 1983 claim was not decided by either of the courts below?

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Respondent Danny Joe Bradley hereby requests that this Court deny the Petition for Writ of Certiorari ("Pet.") filed by petitioners William H. Pryor, *etc.*, *et al.*, seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit entered in this case on September 23, 2002.

COUNTERSTATEMENT OF THE CASE

The facts regarding respondent Bradley's underlying conviction and death sentence, as found by the courts of the State of Alabama and the federal courts in prior proceedings, have been set forth on numerous occasions and need not be revisited here, as they have no particular bearing on this Court's assessment of whether or not the Petition should be granted.[1] Accordingly, respondent addresses here only those limited points set forth in petitioners' factual recitation as to which respondent believes that petitioners' portrayal is inaccurate and therefore misleading, or incomplete.

Petitioners go to great lengths to recount the course of dealings between the State and various counsel acting on behalf of respondent Bradley, starting in 1996, to secure production by the State, on a cooperative basis, of critical items of physical and biological evidence utilized by the State in obtaining respondent Bradley's murder conviction, to allow that evidence to be subjected to DNA testing. Pet. at 9-11. Petitioners clearly imply that respondent's failure to

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1. *See generally Bradley v. State*, 494 So. 2d 750 (Ala. Ct. Crim. App. 1985), *aff'd sub nom. Ex Parte Bradley*, 494 So. 2d 772 (Ala. 1986) (*per curiam*), *cert. denied sub nom. Williams v. Ohio*, 480 U.S. 923 (1987); *Bradley v. Nagle, etc., et al.*, Case No. 93-B-0958-S, Mem. Opinion and Order (N.D. Ala. January 27, 1999), *aff'd*, 212 F.3d 559 (11th Cir. 2000), *cert. denied*, 531 U.S. 1128 (2001).

commence this Section 1983 action until June 2001 supports the conclusion that respondent "sat on his rights" and/or engaged in improper strategic delay in pursuing relief. *Id.* at 14. Petitioners' recitation in this regard is incomplete in content and misleading in substance.

As a factual matter, petitioners fail to acknowledge that, notwithstanding the duration of the efforts by respondent Bradley's representatives to persuade the State to comply with their repeated requests for the production of the subject evidence, as late as September 26, 2000, the Assistant Attorney General acting as the State's lead counsel in this case wrote to respondent's counsel, stating, *inter alia*, that "[a]s soon as possible, I will inform you in writing of the items *that will be made available for DNA testing*." Indeed, not until March of 2001 — after this Court denied certiorari in respondent's federal habeas corpus proceeding — did the State categorically take the position that it would not cooperate with respondent's requests for the production of evidence for testing on a consensual basis. As a legal matter, Petitioners fail to inform this Court that both before the district court and in the Court of Appeals in the proceedings below, they argued that respondent's action should be rejected on the grounds that it was commenced in an untimely manner. The district court expressly declined to rule on petitioners' statute of limitations argument (*see* Pet. Appendix ("App.") at 36 n.20), and the Court of Appeals, *sub silentio*, rejected it. Accordingly, the timing of respondent's filing of this action has no bearing on the issue with respect to which review by this Court is sought by petitioners, and their effort to imply otherwise should be disregarded.

Similarly, this Court should not be distracted by petitioners' discussion of the results yielded by limited DNA

testing that has been completed with respect to certain bedding that was collected from respondent's household during the murder investigation and that was introduced into evidence at trial. Pet. at 12. While fecal/semen stains on that bedding were found by both the State's and respondent's forensic experts to be consistent with the genetic markings of respondent and the victim, respectively, the same test results also identified additional male and female DNA belonging to individuals whose identities are unknown. Moreover, it can hardly be the subject of any good-faith dispute that the items of physical and biological evidence that respondent Bradley seeks to obtain through this action — *i.e.*, the semen-stained clothing in which his stepdaughter's corpse was found and the "rape-kit" swabs and slides prepared by the State's forensic pathologist at the time of autopsy — are, if located, produced, and tested, far more likely to yield findings definitive as to respondent's involvement or non-involvement in the sexual assault of the victim than a blanket containing stains of wholly uncertain and possibly disparate vintage. For these reasons, petitioners' contention that "DNA testing already performed has corroborated [respondent's] guilt" (Pet. at 14) is, at best, an overstatement, and likewise should carry no weight in this Court's assessment of the Petition.

REASONS FOR DENYING THE WRIT

I. NO GENUINE AND MEANINGFUL CONFLICT WORTHY OF THIS COURT'S REVIEW EXISTS BETWEEN THE DECISION BELOW AND THE FOURTH AND FIFTH CIRCUIT DECISIONS INVOKED BY PETITIONERS

Petitioners contend that in ruling below that respondent's post-conviction action under 42 U.S.C. § 1983 seeking to compel the State to produce pertinent evidence for purposes of conducting DNA testing is not the "functional equivalent" of a petition for writ of habeas corpus as contemplated by the analysis provided by this Court in *Heck v. Humphrey*, 512 U.S. 477 (1994), the Eleventh Circuit created a direct conflict with recent decisions of the Fourth and Fifth Circuits in *Harvey v. Horan*, 278 F.3d 370 (4th Cir.), *reh'g denied*, 285 F.3d 298 (4th Cir. 2002), and *Kutzner v. Montgomery County*, 303 F.3d 399 (5th Cir. 2002). Pet. at 13; *see id.* at 15. While petitioners' assertion may appear correct at a superficial level, close scrutiny of the decisions serving as the foundation of petitioners' classic "conflict in the circuits" rationale for the granting of review by this Court casts serious doubts on the merit of petitioners' premise.

In *Harvey v. Horan*, a Virginia state prisoner serving a lengthy sentence on the basis of a conviction for rape and forcible sodomy commenced a Section 1983 action in federal district court after the prosecutor declined his request to be provided with access to "rape kit" evidence in order to allow him to conduct DNA testing that he believed would produce results tending to exculpate him. In both a motion to dismiss, which was denied, 119 F. Supp. 2d 581 (E.D. Va. 2000), and a subsequent motion for summary judgment, the State

unsuccessfully argued that Harvey's complaint failed to state a claim upon which relief could be granted. The district court (Sen. Dist. Judge Albert V. Bryan, Jr.) rejected the State's argument, holding that "pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), the plaintiff has a due process right of access to the DNA evidence and to conduct DNA testing upon the biological evidence, as such evidence could constitute material exculpatory evidence." *Harvey v. Horan*, Civ. Action No. 00-1123-A, 2001 WL 419142 (E.D. Va. April 16, 2001).

On appeal, the Fourth Circuit reversed, a panel led by Chief Judge Wilkinson concluding, *inter alia*, that under this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), the plaintiff's suit was the "functional equivalent" of a collateral attack on the validity of his conviction and/or sentence, cognizable only as a federal habeas corpus petition (which was procedurally barred). *See generally Harvey v. Horan*, 278 F.3d 370, 375, 378 (4th Cir. 2002). Although Circuit Judge King ultimately concurred in the panel's determination to dismiss plaintiff Harvey's Section 1983 action, he expressly disagreed with that portion of Chief Judge Wilkinson's opinion for the Court which addressed the "functional equivalency" analysis, as follows:

> In this proceeding, Harvey seeks access to the biological evidence held by the Commonwealth's Attorney, and his suit, if successful, would merely result in the Commonwealth's Attorney making the evidence available to him. That act alone — providing Harvey with access to the biological evidence relating to his rape conviction — does not, in the words of Justice Scalia, "necessarily imply" the invalidity of Harvey's conviction or sentence. [*Heck v. Humphrey*, 512 U.S.] at 487.

> *Although Harvey might use the evidence, at some future date, to initiate a separate action challenging his conviction, future exculpation is not a necessary implication of Harvey's claim in this case.* Indeed, Harvey's capable counsel acknowledged at oral argument that state-of-the-art DNA testing often inculpates rather than exculpates, and at other times it simply is inconclusive. Thus, it is also possible — and the Commonwealth would say likely — that such testing will provide more conclusive evidence of Harvey's guilt. Put simply, we do not know whether providing Harvey with access to the evidence would assist or hinder his attempts at exculpation; therefore, his civil action requesting access to the biological evidence does not "necessarily imply" the invalidity of his conviction.

278 F.3d at 382-83 (King, J., concurring in part and concurring in the result) (emphasis added). Thus, as regards the specific "functional equivalence" issue, arising under *Heck v. Humphrey*, that was presented in the *Harvey* case and is squarely presented here, only two of the three judges on the initial *Harvey* panel were of the view that a Section 1983 action of the type involved here is actually nothing more than a habeas action "in disguise".

During the pendency of the initial Fourth Circuit appeal in *Harvey*, the Virginia legislature enacted a statute — Va. Code §§ 19.2-327.7 *et seq.* — pursuant to which state prisoners were enabled to pursue post-conviction DNA testing of potentially-exculpatory evidence through proceedings in the state courts. *See generally Harvey*, 278

F.3d at 377, 380 n.3. Subsequent to the issuance of the panel decision denying relief under Section 1983, Harvey succeeded in obtaining an order from the state trial court ordering production by the prosecution of the same evidence he had sought to compel through his action in federal court, thus rendering his pending petition for rehearing in the federal appeal effectively moot. Although rehearing and rehearing *en banc* in the Fourth Circuit were denied accordingly, Judge Luttig of that Court, who had not participated in the panel decision, chose to issue an opinion with respect to denial of the petition for rehearing *en banc*, in light of his view that the important constitutional issues addressed by the original panel decision were wrongly decided. *See Harvey v. Horan*, 285 F.3d 298, 304 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing *en banc*):

> I believe that both the threshold procedural question of whether appellee asserts a cause of action under 42 U.S.C. § 1983 and the fundamental constitutional question of whether there exists under the Constitution of the United States a right, post-conviction, to access previously produced forensic evidence for the purpose of further DNA testing are important questions of law . . . [a]nd . . . that each question was decided incorrectly by the panel[.] . . . [¶] So believing, and having no other opportunity to express my views on these important questions — the panel opinion now constituting the law of our Circuit — I set forth those views herein.

Based on this premise, Judge Luttig explained his unequivocal disagreement with the *Harvey* panel's "functional equivalence" analysis, stating cogently as follows:

> I do not believe that the assertion of a constitutional right of access to evidence post-conviction even arguably implies, let alone "necessarily implies," the invalidity of the petitioner's conviction or sentence, as it must in order to be foreclosed under *Heck v. Humphrey*.
>
> * * *
>
> As to the threshold procedural question, I do not believe it even arguable that a post-conviction action merely to permit access to evidence for the purpose of STR DNA testing "necessarily implies" invalidity of the underlying conviction. Indeed, such *necessarily* implies nothing at all about the plaintiff's conviction. It certainly implies nothing more (and arguably it implies a good deal less) than does an assertion of constitutional right to material and exculpatory information producible under *Brady v. Maryland*, 373 U.S. 83 (1963), which has never been thought necessarily to imply the invalidity of the underlying conviction. The results of any DNA tests that are eventually performed may be inconclusive, they may be insufficiently exculpatory, or they may even be inculpatory. That these scientific possibilities exist, in and of itself, suffices to establish that the asserted right of mere access is not a direct, or for that matter even an indirect, attack on one's conviction or sentence. But if this were not enough

to establish the point, then it should be that, in order to overturn a conviction based on exculpatory evidence that might appear from any DNA testing, the petitioner would have to initiate an entirely separate action at some future date, *in which he would have to argue for his release upon the basis of a separate constitutional violation altogether.*

In sum, on no understanding would a plaintiff's action for mere access to evidence, "even if successful," "demonstrate the invalidity of any outstanding criminal judgment." *Heck*, 512 U.S. at 487. Therefore, on the direct authority of *Heck*, which properly was actually a quite narrow decision, "the action should be allowed to proceed in the absence of some other bar to the suit." *Id.*

Such an assertion of a right only to access is, in principle, wholly unlike the claims asserted in *Heck* for an assertedly illegal investigation and arrest. Those claims, the Supreme Court reasoned, were most analogous to the common-law cause of action for malicious prosecution, *id.* at 484, which required the plaintiff-accused to allege and prove the termination of the prior criminal proceeding in his favor. *Id.* Indeed, the almost polar difference between the claims in *Heck* for "actions whose unlawfulness would render a conviction or sentence invalid," *id.* at 486, and the claim of right merely to access evidence for the purpose of further tests, the results of which may even prove the defendant's *guilt* beyond any question, is virtual confirmation that the latter is

> not a challenge to one's conviction or sentence, but, rather, an assertion of an independent constitutional right.

285 F.3d at 307-08 (Luttig, J., respecting the denial of rehearing *en banc*) (emphasis in original).[2]

While Judge Luttig's analysis is not a decision and lacks the force of law, it nevertheless clearly signals that of the four members of the Fourth Circuit to directly address the precise "functional equivalency" issue that is presented by the instant case, two of them — Circuit Judges King and Luttig — are plainly of the view that a post-conviction Section 1983 action seeking the compelled production of evidence for DNA testing is *not* the "functional equivalent" of a collateral attack on the prisoner's conviction or sentence solely cognizable under the federal habeas corpus statutes and rules. The vitality and continuing viability of the panel's decision in the *Harvey* case as the governing law of the Fourth Circuit, considered in light of Judge Luttig's compelling analysis, is, at a minimum, in doubt. Since the decision of the Fifth Circuit in the other "conflicting" case cited by petitioners — *Kutzner v. Montgomery County*, 303 F.3d 399 (5th Cir. 2002) — essentially adopts the original panel decision in *Harvey* at face value, without critical scrutiny or independent analysis (*see Kutzner*, 303 F.3d at 341), that case is an equally dubious basis for finding the type of genuine, meaningful conflict in the circuits that has often served as the linchpin for this Court's granting of a writ of certiorari.

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2. *See also* Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. Pa. L. Rev. 547, 614-16 (2002).

Petitioner's complete failure to even acknowledge, much less deal with, the subsequent developments casting into uncertainty the continuing vitality of the *Harvey* panel decision as precedent on the "functional equivalence" issue should not mislead this Court. No "conflict in the circuits" worthy of this Court's discretionary expenditure of its scarce and valuable time and resources is presented by the tension between the coherent decision of the court below and the rulings in *Harvey* and *Kutzner*, the continuing force of which are doubtful, to say the least.

II. THE DECISION BELOW FAITHFULLY ADHERES TO THE REASONING AND RESULT ARTICULATED BY THIS COURT IN *HECK v. HUMPHREY* AND ITS PROGENY

The court below determined, based on straightforward application of the standard set forth by this Court in its decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), that respondent Bradley's Section 1983 action is *not* the "functional equivalent" of a petition for habeas corpus (which respondent is no longer entitled to bring, having previously litigated such a petition unsuccessfully, *see* 28 U.S.C. § 2244(b) (*quoted*, Pet. at 2)). The Court of Appeals so held because even if respondent achieves the complete relief he seeks — *i.e.*, production of the evidence sought for DNA testing, or an accounting by the State as to its inability to produce such evidence — both his conviction and death sentence will remain wholly unaffected. *Bradley v. Pryor*, 305 F.3d 1287, 1290 (11th Cir. 2002) (Pet. App. at 5-6).[3]

3. The decision below fully concurred, in so holding, with the coherent reasoning articulated by Judge King of the Fourth Circuit in his opinion concurring in the result reached by original panel in (Cont'd)

Petitioners insist that the court below erred, because "the obvious fact [is] that [respondent] Bradley seeks evidence from the State to attack the validity of his conviction and sentence. The evidence has no other conceivable value to him. The federal habeas corpus statute, including its rules governing discovery, is the proper avenue for [respondent] to obtain such relief." Pet. at 16. It is petitioners, not the court below, whose position is in error. Nowhere in this Court's decision in *Heck* can support be found for petitioner's suggestion that it is the claimant's ultimate *subjective intent*, rather than the objective nature of the relief sought by his or her Section 1983 claim, that is determinative with respect to the "functional equivalency" analysis. Thus, as Judge King observed in his concurring opinion in *Harvey*,

> [a] prisoner's underlying rationale . . . for bringing his § 1983 suit is not relevant under *Heck*. The applicable standard is an objective one, and the only relevant question is whether the prisoner's legal proceeding, if successful, would *necessarily imply* the invalidity of his conviction or sentence. *Heck*, 512 U.S. at 487 (emphasis added).

278 F.3d at 383.

The correctness of Judge King's analysis is illuminated by brief consideration of *Heck* itself. That case, as this Court observed, lay

> at the intersection of the two most fertile sources of federal-court prisoner litigation — the Civil Rights

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(Cont'd)
Harvey v. Horan, as well as with Judge Luttig's opinion regarding the denial of rehearing *en banc* in *Harvey*, both of which are quoted hereinabove. *See Bradley*, 305 F.3d at 1290-91; Pet. App. at 6-8; *compare supra* at 5-10.

> Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983, and the federal habeas corpus statute, 28 U.S.C. § 2254. . . . *Preiser v. Rodriquez*, 411 U.S. 475 (1973), considered the potential overlap between these two provisions, and held that *habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release*, even though such a claim may come within the literal terms of § 1983. *Id.* at 488-490.

Heck, 512 U.S. at 480-81 (emphasis added).

In *Heck*, the Court was called upon to apply the principles articulated in *Preiser* and its progeny to the situation presented by the claim of an Indiana state prisoner who, during the pendency of his direct appeal in the state courts from his conviction for voluntary manslaughter, initiated a Section 1983 action in federal district court, purporting to seek compensatory and punitive damages from certain local and state law enforcement officials who allegedly conducted an unlawful investigation resulting in the plaintiff's arrest, knowingly destroyed evidence which would have proved plaintiff's innocence, and caused an unlawful voice identification procedure to be utilized against plaintiff at his criminal trial. Plaintiff did not seek release from custody as an element of the relief requested in the Section 1983 action. 512 U.S. at 478-79. The district court dismissed the action, holding that the claims asserted "'directly implicate[d] the legality of [plaintiff's] confinement,'" *id.* at 479 (citation omitted in original), and the Seventh Circuit affirmed. In the interim, the Indiana Supreme Court upheld plaintiff's underlying conviction and sentence. *Id.*

Upon review of the lower courts' dismissal decisions, this Court affirmed. Distinguishing Heck's claims from the types of damages claims under Section 1983 that the Court had hypothesized in *dictum* in *Preiser*, and subsequently allowed to proceed in *Wolff v. McDonnell*, 418 U.S. 539 (1974), it held that Heck's claims could not be sustained under Section 1983, because a favorable determination of his claims would *necessarily* undermine the legal basis for his criminal conviction.

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. *Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment*

> *against the plaintiff, the actions should be allowed to proceed*, in the absence of some other bar to the suit.

Heck, 512 U.S. at 486-87 (emphasis added and in original; footnotes omitted).

Thus, the fundamental principle established by *Heck v. Humphrey* is that a state prisoner's action that either directly challenges the validity of his conviction or sentence, or otherwise "necessarily implies" that his conviction or sentence was invalid, will not lie under Section 1983 unless the underlying conviction or sentence has already been struck down. Such actions may be pursued, if at all, only through a habeas corpus proceeding. *See also Edwards v. Balisok*, 520 U.S. 64, 646-48 (1997) (rejecting viability of state prisoner's claims for damages based upon constitutional challenge to procedures utilized by prison officials in conducting administrative hearing resulting in deprivation of prisoner's "good time" credits where, even though prisoner was not seeking reinstatement of lost credits, if allegations made against officials were true, the "necessary implication" was that deprivation of credits was unlawful). By contrast, where a state prisoner's claim asserted pursuant to Section 1983, if meritorious, would *not*, in and of itself, "necessarily imply" the invalidity of the claimant's conviction or sentence, it is expressly permissible under *Heck*. *See Edwards*, 520 U.S. at 648-49 (aspect of prisoner's amended complaint that sought injunctive relief requiring prison officials to adopt and maintain different standards in administrative hearings on a prospective basis "may properly be brought under Section 1983").

Considered in light of these principles, the correctness of the conclusion reached by the court below that respondent Bradley's action seeking only the production of evidence does not "necessarily imply" that he was invalidly convicted or sentenced is readily apparent. The misguided nature of petitioners' effort to focus attention on respondent's subjective intent finds no support in *Heck*, and is illuminated by *Edwards v. Balisok*, in which, notwithstanding the plaintiff prisoner's *express disclaimer* of any intent to obtain restoration of the "good time" credits he asserted had been revoked by the defendant prison officials in an unconstitutional manner, thus giving rise to his Section 1983 claims for damages, this Court nevertheless held that the action could not lie under Section 1983 because if the claimant's allegations were confirmed, the "necessary implication" of such findings would be that the deprivation of the "good time" credits he suffered was wrongful, thus mandating their restoration (and, accordingly, shortening the plaintiff's time of confinement). *See* 520 U.S. at 647-48.

Taken together, *Heck* and *Edwards* establish that the objective character of the relief sought, not the claimant's subjective motivation, determines the viability of a post-conviction prisoner's action under Section 1983. Under these governing authorities, the court below properly held that respondent's action, in which "[h]e prevails . . . once he has access to [the] evidence or an accounting for its absence," is the type of Section 1983 action that *Heck* "explicitly authorizes". *Bradley v. Pryor*, 305 F.3d at 1290-91; Pet. App. 5, 8. Petitioners' conclusory assertion that the court below "ignored the reasoning" of *Heck* — a contention petitioners barely even attempt to support with analysis — is clearly incorrect.

III. THERE IS NO "COMPELLING REASON" FOR THIS COURT TO UNDERTAKE *DE NOVO* CONSIDERATION OF AN UNDERLYING FEDERAL CONSTITUTIONAL QUESTION THAT WAS NOT DECIDED BY EITHER OF THE COURTS BELOW

Apart from the "functional equivalence" issue addressed above, petitioners also seek this Court's grant of a writ of certiorari to address and determine, *de novo*, the question of whether respondent's Section 1983 claim is supported by a valid underlying substantive due process right of post-conviction access to potentially-exculpatory evidence.[4] This issue was not reached by the district court in the proceedings below and, although the Court of Appeals panel required the filing of and presumably considered post-argument supplemental briefs from the parties, it also declined to decide the point.[5]

4. Although petitioners purport to frame the question as whether respondent has *either* a valid procedural *or* substantive due process right in this context, they concede that a procedural due process right exists, but contend that respondent failed to avail himself of the adequate procedures afforded by the Alabama state courts. Pet. at 19-20.

5. In his separate opinion specifically concurring in the decision below, Judge Birch stated in this regard, in pertinent part, that

> before a final conclusion should be reached on [the] unsettled issue [of whether or not respondent has a predicate procedural or substantive due process right to the relief sought], a substantially greater amount of thought and briefing should be pursued; just what rights, if any, does a convicted petitioner, who has exhausted

(Cont'd)

Although petitioners assert in conclusory terms that "the due process issue . . . is an important one that is cropping up in a number of cases throughout the nation," Pet. at 18, they offer no "compelling reasons" — as contemplated by Rule 10 of this Court's Rules — for this Court to depart from its settled practice of declining to accept for review or to rule upon issues that have not been decided by the courts below. *See generally National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999); *United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998); *Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 392, 400 n.7 (1996), *citing Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) ("We generally do not address arguments that were not the basis for the decision below." (Citation omitted.)).

This case does not involve any special exigencies or extraordinary circumstances justifying a departure from this Court's normal refusal to decide issues *de novo*. Indeed, the court below may well have perceived — given the persistence of petitioners' heretofore steadfast, albeit uncorroborated, assertion that the evidence sought by respondent has been lost and therefore cannot be produced[6] — that there may be no need to reach or decide the complex substantive due process issue raised by petitioners if, in the proceedings on remand, the district

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(Cont'd)

> his direct appeals and post conviction avenues of relief, enjoy relative to discovery and testing of DNA evidence? Perhaps on remand, this issue will receive the added scrutiny it deserves.

305 F.3d at 1292; Pet App. at 11.

6. *See generally Bradley v. Pryor*, 305 F.3d at 1289 & n.1; Pet. App. 3 & n.1 (noting State's claim "that both the 'rape kit' and the victim's clothing are missing").

court determines after appropriate discovery that the evidence is, as a matter of fact, no longer available. That outcome would, in the absence of any further issue implicated by evidence of intentional destruction of the evidence,[7] resolve this matter on an alternative ground that obviates the need for adjudication of the constitutional question, in accordance with this Court's oft-stated preference. *See, e.g., Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it. It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to the decision of the case.'" (Citations omitted.)); *accord Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 570 n.34 (1947) ("'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" (Citation omitted.)).

For these reasons, petitioners' invitation to this Court to reach out and grasp, for immediate review and determination, an issue which neither of the lower courts decided in this case and which *none* of the federal appellate courts have addressed, except in *dictum* contained in the original panel decision in *Harvey v. Horan*,[8] is without persuasive force or practical appeal, and should be rejected.

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7. *Cf. Arizona v. Youngblood*, 488 U.S. 51 (1988).

8. *See Harvey*, 278 F.3d at 377; *see also* 285 F.3d at 300-01 (Wilkinson, Ch.J., concurring in the denial of rehearing and rehearing *en banc*), *but see id.* at 310-26 (Luttig, J., respecting the denial of rehearing *en banc*) (explaining basis for finding that substantive due process right of post-conviction access to potentially-exculpatory evidence exists).

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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